Amendments to the United States. The Plaintiff also alleges the Torts of "Infliction of Emotional Distress and Physical Pain and Suffering".

1. The Court has Jurisdiction over the Plaintiff's claims of violation of Constitutional rights under 42 U.S.C. sec 1331(a) and 1343.

2. The Court has supplemental Jurisdiction over the Plaintiff's State Law Tort claim under 28 U.S.C. sec 1367.

3. Plaintiff has exhausted all available administrative remedies. On September 15, 2001, the Plaintiff filed the appropriate grievance within the Department, citing each instant in which Plaintiff is alleging in this Complaint. The response to said grievance is undated, Plaintiff on October 11, 2001, filed a step II, grievance Appeal to the institutional Warden, on October 18, 2001, Warden Bock responded to Plaintiff's claims, however, the Warden failed to rectify the matter, and on November 2, 2001, the Plaintiff filed a step III grievance to the prison director, that step has yet to be responded to.

4. Defendant Opanasenko, is a Correctional Officer, employed within the Michigan Department of Corrections. This defendant is being sued in his individual capacity.

5. Defendant Bock, is the Institutional Warden and overseer at the Saginaw Correctional Facility, which the alleged incident occurred. This defendant is being sued in her individual and official capacity.

6. Defendant Chaplin, is the Deputy of programs and overseer of prisoners work assignments and have the duty to approve or deny work assignments for prisoners. This defendant is being sued in her individual and official capacity.

7. Defendant Morrison, is the Classification director and have the duty of requesting that a prisoner be placed on certain assignments This defendant is being sue in his individual and official capacity.

8. Defendant's Jane Doe and John Doe, are both Medical personnels and have the duty of Medically clearing a prisoner for work assignments within the Institutional. Both Jane and John Doe is being sued in their individual and official capacities.

9. All the Defendant's herein have acted and continue to act under the color of State law at all times pertinent to this Complaint.

10. On or about July 19, 2001, the Plaintiff was assigned to an unskilled work assignment within the prison setting as "Big Yard Equipment handler".

11. On or about July 23, 2001, the Plaintiff reported to the assigned area, at that time, Plaintiff informed officer Opanasenk, that the Plaintiff was unable to perform the requirements of said work assignment.

12. Being the Equipment Handler, required Plaintiff to lift, stand, bend and stoop. Plaintiff must also lift the standard Baseball Equipment bag, horseshoes, basketballs, etc.

13. Despite the obvious nature of Plaintiff's injuries, Officer Opanasenko told Plaintiff, that if the Plaintiff is not on the work assignment, that Plaintiff would be cited for a Major Out of Place. That there was nothing wrong with the Plaintiff.

14. Due to a motor vehicle accident within the Michigan Department of Corrections on November 14,

2000, as a proximate result of that accident the Plaintiff suffered the following injuries: Traumatic C5-C6 fracture dislocation with myelopathy, requiring open reduction, posterior wiring of C5 to C6, posterior fusing of C5 to C6 and harvesting of iliac bone from the right posterior iliac crest area. Small anterior hematoma in the spinal cord which resulted in temporary paralysis. Hairline fracture of the left arm. Abrasion to the scalp. Lower back injuries. Weakness in the upper and lower extremities on the left side. Numbness of entire body below the neck.

15. That at the time of the alleged incident herein, the Plaintiff was wearing a neck brace, left leg brace and walking with a cane, and under the medication of Baclofen, which causes fatigue, with a sedated side effect.

16. Defendant Opanasenko harassed the Plaintiff daily, telling Plaintiff that Plaintiff was "faking" his condition and that Plaintiff will do as Plaintiff was told or suffer the consequence.

17. Defendant Morrison, knew that due to Plaintiff current condition that Plaintiff was unable to perform the within work assignment. Plaintiff had verbally communicated with defendant Morrison and defendant Morrison knew of the Plaintiff condition.

18. Defendant V. Chaplin, as head of programming had a duly to check and see whether Plaintiff was medically cleared and physically able to perform a work detail. Defendant V. Chaplin, know, knew or should have known of the Plaintiff condition.

19. Defendant Bock, is the overseer of the institution that the Plaintiff is being housed at and it is defendant Bock duty to know whether or not the prisoners of the

within institution is being treated fairly and with dignity and not having sanctions imposed in an inhumane way. Defendant, Bock know, knew or should have known what was taking place within the prison setting that the defendant is the supervisor of.

20. Defendant's Jane Doe and John Doe owed to Plaintiff a duty to inform the appropriate staff members that the Plaintiff was unable to perform said duties.

21. Each defendant failed to act under the duties owed to Plaintiff, not to be placed in a position that would expose Plaintiff to a serious risk of serious injuries. Each defendant, know, knew or should have known that the Plaintiff was physically unable to perform the work assignment that issued to Plaintiff.

22. Consequently, due to Plaintiff being forced to work or receive a major citation, Plaintiff re-aggravated the injuries to Plaintiff's back, neck and shoulders, which caused the Plaintiff to increase the pain medication of Baclofen.

23. That as a proximate result of the defendant's breach of duties owed to Plaintiff, Plaintiff re-aggravated and re-injured Plaintiff's lower back, shoulders and neck.

24. That as a result of the violation of the Plaintiff's First, Eighth and Fourteenth Amendment rights, Plaintiff sustained the following injuries:

A. Physical pain and suffering, mental anguish, fright and shock.

B. Emotional and mental stress.

C. That Plaintiff will sustain each and every injury.

25. That Qualified Immunity does not apply to these defendant's because the defendant's knowingly violated clearly established Statutory and Constitutional rights of Plaintiff and acted outside the scope of their duties which would entitle the defendant's to Government Agent Immunity.

HARASSMENT

26. Plaintiff hereby, realleges, reaffirms and incorporates herein by reference each and every allegation contained in paragraphs 1 through 25, as though fully set in word for word.

27. That on August 20, 2001, the Plaintiff was harassed and intimidated by defendant Opanasenko, when the defendant attempted to make the Plaintiff remain at the recreation shack and lift up the baseball bag and hand it to another prisoner that was requesting the bag.

28. When Plaintiff refused to lift the baseball bag, the defendant threaten to have Plaintiff placed in Segregation until Plaintiff learn how to do what Plaintiff was told.

29. On August 21, 2001, defendant Opanasenko, informed Lieutenant Martin, that Plaintiff was staring at defendant during morning breakfast and that the defendant felt threaten by the stare of the Plaintiff.

30. Several minutes later, when Plaintiff returned to the unit from breakfast Lieutenant Martin call the Plaintiff out and explained to the Plaintiff that the defendant, Officer Opanasenko, had informed him that at morning breakfast Plaintiff was staring at the defendant in a

threaten manner and that the defendant wanted to place Plaintiff in segregation for Threaten Behavior.

31. This incident occurred even though the Plaintiff walk with a cane, had a foot and neck brace on and suffered paralysis on the left side of Plaintiff body.

32. The defendant, Officer Opanasenko, constantly harassed and degrade left the Plaintiff, causing the Plaintiff to suffer emotional and mental stress.

RETALIATION

33. On August 20, 2001, defendant Opanasenko, filed a work evaluation form on the Plaintiff, alleging that the Plaintiff was a poor worker and that Plaintiff actions in telling the defendant that Plaintiff was unable to perform those duties "appeared to be threaten".

34. For several days after the defendant filed the work evaluation report, defendant would see the Plaintiff and wink his eye and make comments of: how it feels to get paperwork written against you, or you need to quit it, there's nothing wrong with you.

CLAIM FOR RELIEF

35. That the actions of defendant, Officer Opanasenko in harassing and retaliating against the Plaintiff and making Plaintiff perform duties beyond Plaintiff physical capabilities violated Plaintiff First, Eighth and Fourteenth Amendment Rights, was done intentionally and without regard to Plaintiff's health and safety, was "Deliberate Indifference" and violated established Statutory or Constitutional Rights.

36. That failure of defendant's Bock, Chaplin and John and Jane Doe to act and rectify the issuing of Plaintiff a work assignment which the Plaintiff was and is physically incapable of performing constitute the violation of Statutory and Constitutional rights and created a greater risk of injuries to the Plaintiff.

37. That defendant Morrison, in requesting that the Plaintiff be placed on said assignment, willfully and wanton committed the act of Deliberate Indifference against Plaintiff in requesting that Plaintiff be place on said work assignment.

WHEREFORE, THE Plaintiff, respectfully request that this Honorable Court grant the following relief:

A. Issue a Declaratory Judgment stating:

I.

That the harassment and retaliation of Plaintiff and having Plaintiff perform duties beyond Plaintiff's physical capabilities by defendant Opanasenko violated the Plaintiff's rights under the First, Eighth and Fourteenth Amendment of the United States Constitutions.

II

That the failure of defendant's Bock, Jane and John Doe to curb the risk of placing the Plaintiff in a greater risk of physical injuries constitute a Deliberate Indifference under State and Federal Constitutional Law.

III

That defendant v. Chaplin approval of the assignment for Plaintiff violated the Plaintiff's First, Eighth and Fourteenth Amendment Right under the United States Constitutions. Placing the Plaintiff in greater risk of serious injuries.

IV

That defendant Morrison requesting that the Plaintiff be placed on said assignment violated the Plaintiff first, Eighth and Fourteenth Amendment Right to the United States Constitutions. Where the Plaintiff was placed on an assignment that exposed the Plaintiff to an excessive risk of injuries to Plaintiff's health and acted with Deliberate Indifference.

B. Issue an injunction ordering that defendant's Bock, V. Chaplin and Morrison or their designated person:

I

Remove the 363 assignment evaluation from the Plaintiff's institutional files and that no information pertaining to the work assignment exist in Plaintiff's files.

WHEREFORE, THE Plaintiff respectfully request that this Honorable Court grant Compensatory Damages JOINTLY and SEVERALLY in the amount of TEN THOUSAND DOLLARS ($10.000) against defendants Bock, Chaplin, Morrison, Opanasenko, John and Jane Doe.

AWARD PUNITIVE DAMAGES in the amount of TWENTY THOUSAND DOLLARS ($20.000) JOINTLY and SEVERALLY against defendants Opanasenko, Bock, V. Chaplin and Morrison. Plaintiff further claim Judgment for whatever Plaintiff is found to be entitled to, including Court cost, Attorney fees and interest from the date of filing this Complaint.

Dated: October 17, 2002

/s/ Lorenzo L. Jones/Johnson
By. Lorenzo L. Jones/Johnson
#176204

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RESPONDEAT SUPERIOR

NOW COMES, the Plaintiff, Lorenzo L. Jones/Johnson, through and by himself and adds a Count alleging Respondent Superior as following:

38. Plaintiff hereby realleges, reaffirms and incorporate herein by reference all allegations in paragraphs numbered 1 through 37.

39. Defendant, Michigan Department of Corrections, is the employer of the Defendants, V. Chaplin, Bock, Morrison, Opanasenko and Jane and John Doe, who were acting within the course and scope of their employment with the defendant at the time of the alleged incident herein.

40. That in addition to the allegations set out in this Complaint, the defendants employer, the Michigan Department of Corrections is liable for the defendants violations under the doctrine of Respondeat Superior.

41. That as a proximate cause of defendants violations, the Plaintiff re-aggravated prior injuries, suffered emotional stress and other injuries and damages that is set above.

WHEREFORE, THE Plaintiff respectfully request that this Honorable Court grant Compensatory Damages in the amount of TEN THOUSAND DOLLARS (10.000).

AWARD PUNITIVE DAMAGES in the amount of TWENTY THOUSAND DOLLARS ($20.000).

## VERIFICATION

I, Lorenzo Lee. Jones/Johnson, declare under the penalty of perjury that the information and statements herein are true and accurate to the best of my belief, information and knowledge

Dated: October 17, 2002

/s/ Loernzo L. Jones/Johnson
By. Lorenzo L. Jones/Johnson
#176204
9625 Pierce Road
Freeland, Michigan 48623

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204

Plaintiff,

vs.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF CORRECTIONS, B. BOCK, V. CHAPLIN, P. MORRISON, OFFICER OPANASENKO, JANET KONKLE, AND AHMED ALDABAUGH,

Defendants.
_____/

Case No. 02-74336

HONORABLE VICTORIA A. ROBERTS
HONORABLE STEVEN D. PEPE

REPORT AND RECOMMENDATION

(Filed Jul. 30, 2003)

Lorenzo Jones ("Plaintiff") is a prisoner in the custody of the Michigan Department of Corrections ("MDOC"). On November 15, 2002, he filed a complaint against the above named defendants pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the First, Fourth, and Fourteenth Amendments. Plaintiff is proceeding *in forma pauperis*. Defendants have filed a motion to dismiss and a motion to stay discovery, both of which were referred for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A).[1] For the following reasons, defendants'

[1] Because Defendants' motion to dismiss is a dispositive motion, the undersigned Magistrate Judge may issue only a Report and
(Continued on following page)

motion to dismiss should be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for failure to state a claim; however, Plaintiff has exhausted federal constitutional claims with respect to Defendants Morrison and Opanasenko and, thus, these claims should not be dismissed at this time.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2000, Plaintiff was involved in a motor vehicle accident while in the custody of MDOC, which resulted in significant injury. Plaintiff alleges that he suffered a C5-6 fracture dislocation with myelopathy which required fusion surgery. He also suffered a hematoma to the spinal cord, hairline fracture to his left arm, abrasions on his scalp, lower back injuries, upper and lower extremity weakness on the left side, and numbness below his neck.

On or around July 19, 2001, Defendant Morrison, who determines the work assignments of prisoners at the facility in which Plaintiff is incarcerated, assigned Plaintiff to a position as the "Big Yard Equipment Handler," which involves lifting, standing, bending, stooping, and passing out equipment such as the baseball equipment bag, horseshoes, and basketballs. Plaintiff claims that he notified Morrison of his injuries, but that the assignment was not changed. Plaintiff reported to this assignment on or around July 23, 2001, and informed the staff member in charge, Defendant Opanasenko, that he could not perform

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Recommendation, not a final determination, on that motion. 28 U.S.C. § 636(b)(1)(A).

the duties required because of his injuries. Plaintiff wore a neck brace and a left leg brace and walked with a cane. Allegedly, Opanasenko stated that Plaintiff was faking his injuries and told Plaintiff that he could either perform his work assignment "or suffer the consequences." Plaintiff claims that he chose to work in order to avoid receiving a major misconduct ticket; as a result, he aggravated his injuries. Plaintiff also claims that Opanasenko harassed him by threatening to place Plaintiff in segregation if he did not perform his job and by telling a superior officer that Plaintiff was staring at him in a threatening manner. Plaintiff finally asserts a retaliation claim by stating that Defendant Opanasenko issued a false work evaluation. Essentially, Plaintiff is alleging First Amendment retaliation and Eighth Amendment deliberate indifference claims against Opanasenko and a deliberate indifference claim against Morrison.

Plaintiff also asserts that Defendants Chaplin, a deputy warden who apparently is in charge of approving work assignments; Warden Barbara Bock; Konkle, a registered nurse; and Aldabaugh, a physician,[2] either knew or should have known of Plaintiffs alleged inability to work and should have rectified the situation. He asserts that Defendant Chaplin violated the First, Eighth, and Fourteenth Amendments and that Bock, Konkle, and Aldabaugh violated the Eighth Amendment through their deliberate indifference to his medical needs. Finally, Plaintiff alleges a claim of respondeat superior against

[2] In his complaint, Defendants Konkle and Aldabaugh were named as Jane and John Doe. Plaintiff subsequently filed a motion to add Konkle and Aldabaugh as defendants, which motion was granted on January 17, 2003. These two defendants have not yet been served.

MDOC. On November 19, 2002, District Judge Victoria Roberts dismissed Plaintiff's claims against MDOC and the State of Michigan because those defendants were entitled to immunity under the Eleventh Amendment.

On February 13, 2003, Defendants Bock, Chaplin, Morrison, and Opanasenko filed a Rule 12(b)(6) motion to dismiss for failure to exhaust and a motion to stay discovery. Plaintiff responded to the Rule 12(b)(6) motion on February 21, 2003, and again on March 28, 2003. He claims he did comply with the exhaustion requirement by explaining the exhaustion process in his complaint and that Defendants attached evidence of exhaustion to their motion to dismiss.

## II. ANALYSIS

### A. Rule 12(b)(6)

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 117 (1990); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, *pro se* complaints are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Ordinarily, a court may decide a motion to dismiss only on the basis of the pleadings. *See Song v. City of Elyria, Ohio,*

985 F.2d 840, 842 (6th Cir. 1993). Additionally, the Prison Litigation Reform Act of 1995 ("PLRA") mandates that a court screen a prisoner's complaint and dismiss any claims raised that are frivolous, malicious, or fail to state a claim upon which relief may be granted, 28 U.S.C. § 1915A(b)(1); *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997), and may dismiss any such claim without first requiring exhaustion of administrative remedies. 42 U.S.C. § 1997e(c).

B. Exhaustion of Administrative Remedies

The PLRA, which applies to all claims filed after April 26, 1996, requires a prisoner to exhaust all administrative remedies before bringing a federal suit regarding prison conditions. 42 U.S.C. § 1997e(a). This requirement applies to all § 1983 claims that fall under "the definition of a 'civil action with respect to prison conditions' as set forth in 18 U.S.C.A. § 3626(g)(2)." *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999) (footnote omitted) (applying exhaustion requirement to prisoner's equal protection claim). That section provides:

> the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. . . .

18 U.S.C.A. § 3626(g)(2).

The exhaustion provision of the PLRA provides in pertinent part, "[n]o action shall be brought with respect

to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held that the exhaustion requirement must he satisfied, so long as some responsive action is available, even if the relief sought is not available. *Booth v. Churner*, 532 U.S. 731, 736-41, 740 n.5 (2001).

The Sixth Circuit has applied the requirements of the PLRA to hold that a prisoner who files a § 1983 claim involving prison conditions must *allege* and *show* that he has exhausted all available state administrative remedies. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). That Court has further stated that when filing a civil complaint regarding prisoner conditions, "a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and outcome." *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion *with the complaint* can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievances so prison officials can address the claims before a suit is brought in federal court. *Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

C. Factual Analysis

1. *Defendants Bock, Chaplin, Konkle, and Aldabaugh*

Although Plaintiff alleges First and Fourteenth Amendment[3] claims against Chaplin, he states no facts that would support such claims. Rather, Plaintiffs factual allegations potentially support only claims that these four defendants were deliberately indifferent to his medical needs by failing to remove him from the work detail he claims he could not perform. Yet, he has failed to state a claim upon which relief could be granted with respect to any of these defendants; Plaintiff's claims against these four defendants should be dismissed.

Prison officials may be liable under the Eighth Amendment for deliberate indifference to inmates' health or safety. *Farmer v. Brennan*, 511 U.S. 825, 832-35 (1994). In order to be held liable, the official must know of and disregard an excessive risk to inmate health or safety. *Id.* at 837. The prisoner must show that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Id.* at 841-42. A claim of deliberate indifference requires a showing of more than mere negligence and less than actual intent. *See Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995) (equating deliberate indifference with "criminal recklessness, which requires a subjective showing that the defendant was aware of the risk of harm."); *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992)

[3] Based upon Plaintiff's allegations, which are devoid of any due process or equal protection issues, his Fourteenth Amendment claim can be cited only for the fact that the Fourteenth Amendment applies to protections of the first eight amendments to the Constitution to the states.

("Obduracy or wantonness, not inadvertence or good faith error, characterizes deliberate indifference."); *Ribble v. Lucky*, 817 F. Supp. 653, 655 (E.D. Mich. 1993) (finding even "gross negligence" by prison officials insufficient to support a claim of deliberate indifference).

Thus, to satisfy this objective component, a plaintiff must allege a deprivation that is "sufficiently serious." "[O]nly those violations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Additionally, the Court has required a showing of "extreme deprivations . . . to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

A medical need is "serious" if it has been diagnosed by a physician as requiring treatment or is so obvious that a lay person would easily recognize the necessity for a doctor's attention. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). A serious ailment requires immediate attention or is potentially life-threatening: "[a] 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citation omitted), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). *Farmer* explains further that in order to demonstrate the subjective element of deliberate indifference, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . ." 511 U.S. at 836-37.

This subjective element may be proven, however, when circumstantial evidence shows that the risk of harm was so obvious that an official must have known of its existence. *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 n.7 (6th Cir. 2002) (citing *Farmer*, 511 U.S. at 842).

Here, Plaintiff makes no assertions that any of these defendants had any direct role in the job assignment, and makes only conclusory allegations that any of these defendants knew of a serious risk of harm to Plaintiff or actually drew such an inference. Without more detail, such conclusory assertions cannot be the basis of a § 1983 claim. *See Ana Leon T. v. Federal Reserve Bank*, 823 F.3d 928, 930 (6th Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986).

He claims that Defendant Chaplin must agree to all work assignments, but makes no assertion that Chaplin actually knew of facts from which he could infer the existence of a substantial risk of harm, nor does he provide concrete assertions that Chaplin actually drew such an inference. The same is true of his assertions against Defendant Bock. With regard to nurse Konkle and Dr. Aldabaugh, Plaintiff states only that they had the duty to inform other MDOC officials that he could not perform the duties of the equipment handler. Even if such a duty exists, and even if the failure to inform other MDOC staff members of the extent of Plaintiff's impairments was negligent, the has not alleged that these two health care workers actually drew the inference that a serious risk of harm existed. Medical malpractice, without more, does not constitute an Eight Amendment violation.

Rather, he seems to assume that because he wore neck and leg braces and used a cane, these defendants

should have determined that he could not perform his job because the risk of harm was obvious. Even assuming that all four of these defendants had knowledge of Plaintiff's condition, he makes only conclusory and unsupported assertions that his condition was sufficiently serious for the defendants' inaction to rise to the level of deliberate indifference. The fact that Plaintiff continued to suffer from his injuries does not necessarily mean he could not perform the job at issue. It is of note that of the medical records Plaintiff attached to his response to the motion to dismiss to support his claim that he could not work, the only document that sheds any light on his ability to work is a form completed by a physician noting that Plaintiff was unable to perform certain work between November 14, 2000 – the date of his injury – and March 12, 2001 – four months prior to the time he was assigned to the Big Yard Equipment Handler position. Considering Plaintiff's allegations in the light most favorable to him, it cannot be said that Plaintiff adequately alleged that these four defendants either knew of a serious risk of harm or drew such an inference. As such, Plaintiff cannot state a cognizable deliberate indifference claim against Defendants Bock, Chaplin, Konkle, and Aldabaugh, and these claims should be dismissed.

2. *Defendants Opanasenko and Morrison*

Plaintiff alleges that Defendants Morrison and Opanasenko were deliberately indifferent to his medical needs and that Opanasenko retaliated against him in violation of the First Amendment. Based solely upon the allegations in his complaint viewed in the light most favorable to Plaintiff, he appears to have asserted cognizable constitutional claims in this regard. Thus, whether

Plaintiff met the exhaustion requirement is a necessary consideration. In his responses to defendants' motion to dismiss, Plaintiff asserts both that he adequately described the exhaustion procedures in his complaint as permitted by *Knuckles-El* and that he submitted proper documentation of exhaustion in those responses. Although Plaintiff does state in his complaint that he filed the necessary grievances, providing the dates on which such grievances were filed, he only states that the grievances "cit[ed] each instant in which [sic] Plaintiff is alleging in this complaint." Compl. at 2. Yet, he does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. Without such explanation, this Court cannot make a finding that he described the process with the needed specificity.

Moreover, although Plaintiff attached the Step I grievance and the Step II and III appeals to his responses to the motion to dismiss, such conduct does not satisfy the exhaustion requirement. A prisoner may not amend a complaint to satisfy the exhaustion requirement when he has not complied with that requirement in the first instance. *Baxter*, 305 F.3d at 489. *Baxter* has been cited by at least one unpublished case to hold that *sua sponte* dismissal for failure to exhaust was proper even where a plaintiff submitted evidence of exhaustion after he had filed his complaint. *Zeigler v. Michigan*, 2003 U.S. App. LEXIS 2239 (6th Cir. Feb. 6, 2003) (unpublished). Thus, these arguments do not preclude dismissal.

Yet, Plaintiff also notes that in the motion to dismiss, *defendants* provided the documentation necessary to establish exhaustion and thus, dismissal of his claims is not appropriate. This issue has not explicitly been addressed by this or any other circuit. Defendants do, in fact,

attach documentation that indicates Plaintiff filed a Step I grievance which he appealed through Step III.[4]

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[4] Defendants attach this documentation in an effort to show that Plaintiff failed to exhaust *all* of his claims, arguing that his failure to exhaust even one claim raised in the lawsuit requires dismissal of the entire complaint. Defendants' argument in this regard in unavailing. In support of this claim, defendants cite *Smith v. Federal Bureau of Prisons*, 300 F.3d 721 (6th Cir. 2002); *Linder v. Sundquist*, 2002 U.S. App. LEXIS 19662 (6th Cir. Sept. 18, 2002) (unpublished); and *Kemp v. Jones*, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002) (unpublished).

Both *Smith* and *Linder* dismissed the plaintiffs' claims for failure to exhaust; however, in both cases, the plaintiff had not exhausted *any* claims. *Smith*, *supra*, at 723; *Linder*, *supra*, at *4. In *Kemp*, the court did dismiss all of the plaintiff's claims despite the fact that some of those claims were exhausted. *Kemp*, *supra*, at *3-*4. The court cited *Mack v. DeWitt*, 2002 U.S. App. LEXIS 8609 (6th Cir. Apr. 30, 2002) (unpublished), to support this finding. *Id.* In *Mack*, however, the plaintiff's claims were dismissed because, as in *Smith* and *Linder*, the plaintiff did not attach any documentation to support a finding that he exhausted his administrative remedies for *any* of his claims. *Mack*, *supra*, at *4-*5. Because *Kemp* is not based on any authority that supports its ultimate holding, this Court should not follow *Kemp*.

*Smeltzer v. Hook*, 235 F. Supp. 2d 736, 2002 U.S. Dist. LEXIS 17686 (W.D. Mich. 2002), and *Keenan v. Twommey*, 2000 U.S. App. LEXIS 21200 (6th Cir. Aug. 10, 2000) (unpublished) (simply affirming, but not discussing, a district court ruling with the same reasoning as *Smeltzer*), neither of which are cited by defendants, provide some support for defendants' claim. *Smeltzer*, preferring "total exhaustion" over "claim exhaustion," focuses on the language of § 1997e(a), which requires exhaustion to be complete before a prisoner can bring an "action," and decides that failure to exhaust even one claim requires dismissal of the entire "action" rather than just that claim. *Smeltzer*, *supra*, at *20-21. *Smeltzer* also discusses policy arguments for requiring total exhaustion such as conservation of judicial resources, discouraging prisoners from raising unexhausted claims, and a similar requirement in habeas cases. *Id* at *23-25.

While *Smelter* distinguishes between dismissing "actions" and "claims," it is not clear that the different language indicates that Congress intended to require dismissal of an entire case when a

(Continued on following page)

prisoner fails to exhaust even one claim. Section 1997e(a) states that a prisoner may not bring an action without first exhausting available administrative remedies. Yet, once any unexhausted claims are dismissed, the action only involves exhausted claims, and even under defendants' theory, § 1997e(a) will be satisfied.

Additionally, the policy arguments set forth in *Smeltzer* are not convincing. The PLRA already provides significant motivation to exhaust. Although many prisoners fail to do so, many others have realized the effect of § 1997e(a) and at least attempt to carefully comply with the statute. While *Smeltzer* argues that judicial resources will be conserved by following this rule, the likely result is that a prisoner whose exhausted claims are dismissed under "total exhaustion" will simply refile his complaint alleging only the exhausted claims. *See Cooper v. Garcia*, 55 F.Supp. 2d 1090, 1095 (S.D.Cal. 1999); *Jenkins v. Toombs*, 32 F.Supp. 2d 955, 959 (W.D.Mich. 1999). As such, each such lawsuit will actually turn into two lawsuits and, assuming the statute of limitations does not bar refiling, the court will be required to address the issues regardless of "total exhaustion," *Cooper*, 55 F.Supp. 2d at 1094-95. In this case, the limitations period will not run until at least July 2004.

Moreover, although *Smeltzer* analogizes to the habeas context in which prisoners are required to completely exhaust state remedies prior to filing suit, in habeas cases a federal court may order a stay of federal proceedings to allow a prisoner to exhaust state remedies – a remedy not generally available in prisoner § 1983 litigation. *See Duncan v. Walker*, 533 U.S. 167, 182-83 (2001) (Stevens, J., concurring) (suggesting that a stay to permit state exhaustion in *habeas* cases is proper); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (adopting Justice Stevens' argument in *Duncan*); *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999) (holding that a prisoner's failure to exhaust prior to filing a § 1983 lawsuit requires dismissal); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997) (noting that prior to passage of the PLRA, granting a stay in a prisoner's § 1983 lawsuit was permissible when exhaustion was not completed prior to filing, but that exhaustion prior to filing suit is now mandatory).

Recently, the Sixth Circuit has issued an unpublished decision adopting the "total exhaustion" approach. *Shorter v. Campbell*, 2003 U.S. App. LEXIS 3343, *5-*6 (6th Cir. Feb. 20, 2003) (unpublished) (citing *Julian-Bey v. Crowley*, 24 Fed. Appx. 393, 2001 U.S. App. LEXIS 26192 (6th Cir. Dec. 3, 2001) (unpublished order)). Both cases rely on *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), to support their

(Continued on following page)

Thus, the first question that must be addressed is whether a complaint must be dismissed for failure to exhaust when a plaintiff does not demonstrate exhaustion with the complaint, but where the *defendant* provides evidence of exhaustion. This is a different situation than involved in *Baxter* and not one a Plaintiff could manipulate to try to avoid a dismissal as in *Baxter*.

The primary purpose of the PLRA was to reduce the number of frivolous lawsuits and to provide for more efficient adjudication of non-frivolous suits filed by prisoners. *See, e.g., Porter v. Nussle*, 534 U.S. 516, 524-25 (2002); *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999).

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holdings. *Id.* ("*Brown* makes it explicit that a prisoner must exhaust his administrative remedies before filing his complaint. *Brown* makes no provision for a 'mixed' complaint. There must be exhaustion of every grievance filed." (citations omitted)). Essentially, *Shorter* and *Julian-Bey* reach the conclusion that because *Brown* did not explicitly indicate that "mixed" complaints were permissible it, in fact, rejected such a possibility.

To the contrary, published Sixth Circuit authority has indicated otherwise. *Knuckles-El v. Toombs*, 215 F.3d 640 (6th Cir. 2000), decided subsequent to *Brown*, stated

> [w]e reserve to another day the question of whether exhausted claims in a "mixed" complaint should be addressed when such claims otherwise meet the pleading requirements or whether such a complaint should be dismissed in its entirety. The complaint here does not meet the pleading requirements set forth in *Brown* . . . and it was therefore properly dismissed.

*Knuckles-El*, 215 F.3d at 642. The court explicitly differentiated between the requirements in *Brown* and the undecided question of whether a prisoner's complaint must be dismissed for failure to exhaust only some of the claims raised. While *Knuckles-El* did leave open the question of whether "total exhaustion" or "claim exhaustion" would be the correct method to adopt, it certainly did not interpret *Brown* as requiring "total exhaustion," and no subsequent published authority has interpreted *Brown* in the manner suggested by *Shorter*.

Protection of agency autonomy and promotion of judicial efficiency have also been cited as motivations behind the exhaustion requirement. *See, e.g., Brown v. Toombs*, 139 F.3d 1102, 1103-04 (6th Cir. 1998); *Wright v. Morris*, 111 F.3d 414, 421 (citing *McCarthy v. Madigan*, 503 U.S. 140 (1992), *superceded by statute on other grounds as noted in Booth v. Churner*, 532 U.S. 731, 739-40 (2001)).

When a defendant admits that certain arguments have been exhausted and/or supplies a court with demonstration of such exhaustion, certain of the above concerns behind the PLRA are either diminished or non-existent. Agency autonomy is no longer in question, as the defendant(s) – in this case, employees of MDOC, the agency at issue – shows that the agency had the opportunity to address certain of the complaints and deal with the issues internally before a lawsuit was filed. Especially when the defendant provides copies of the grievances and appeals filed, concerns of judicial efficiency are diminished because, as noted in *Porter v. Nussle*, "adjudication [can] be facilitated by an administrative record that clarifies the contours of the controversy." 534 U.S. at 525. Such documentation also helps a court begin to determine the relative merit or frivolity to a prisoner lawsuit – at least as much as in situations where the documentation is attached to the original complaint.

Moreover, while *Baxter* appears to require dismissal for the Plaintiff's failure to demonstrate exhaustion with the complaint despite these policy considerations, that case is distinguishable from the present case. In *Baxter*, the district court, holding that a *plaintiff* cannot amend a complaint to cure a defect in pleading exhaustion, dismissed the plaintiff's complaint *sua sponte* because the prisoner had failed to show in his complaint that he had

exhausted his administrative remedies. *Baxter*, 305 F.3d at 488-89. Indeed, in *Baxter*, plaintiff had not even alleged that he had completed the exhaustion requirement against the defendants. Plaintiff in the present case did allege that he had completed exhaustion against the Defendants, and even gave the precise dates on which the grievance and appeals were filed, but failed to attach the necessary documentation. The *defendants* did attach the missing documents evidencing exhaustion to their motion to dismiss prior to Plaintiff's attempt to supplement the record by attaching the same documentation. Defendants' motion was filed on February 13, 2003. This case was not referred to the undersigned until March 18, 2003. Thus, when the undersigned first received this case for consideration, proof of exhaustion was already present in the record through a filing provided by *defendants*. Were this Court to recommend *sua sponte* dismissal as envisioned in *Baxter*, which would often take place before supplemental evidence of exhaustion could be provided, such a recommendation and action would not greatly facilitate the policy considerations that lie behind the exhaustion requirement. Because the defendants supplemented the record *before* the present case was referred to the undersigned, *Baxter's* reasoning seems inapplicable here. Accordingly, there is no logical reason why the grievances attached to defendants' motion to dismiss should not be considered for exhaustion purposes. Because the statute of limitations has not run, and dismissal would be without prejudice, the case would likely be re-filed with documents on exhaustion that are before the Court attached.

Therefore, the next question is whether Plaintiff, through the grievance and appeals attached to defendants' motion to dismiss, properly exhausted his claims against

Defendants Morrison and Opanasenko. Defendants argue that although Plaintiff listed many people as subjects of his grievance, the body of the grievance dealt only with Plaintiff's poor work evaluation, upon which his First Amendment retaliation claim is partially based.

The grievance forms attached to Defendants' brief do show that the grievance was about Plaintiffs dispute with Officer Opanasenko over his claim he could not do the equipment handling job. He claims that after he complained to the "Classification Director" [Morrison] apparently about his job assignment, he was told to write a grievance. Plaintiff thereafter told Defendant Opanasenko that he could not physically do the job. Defendant Opanasenko allegedly began to harass him, insisted that Plaintiff pick up equipment and hand the items to other inmates, and stand around for 15-20 minutes, even though he still wore a neck brace and walked with a cane. Plaintiff claimed that Defendant Opanasenko "fabric[ated] an assignment evaluation form" and falsely indicated that Plaintiff had written that he sought to be removed from this detail. Defendant Opanasenko also allegedly threatened to write a ticket on Plaintiff for threatening behavior, but did not. Rather, he wrote the negative work evaluation. Plaintiff asserts generally that Morrison and Opanasenko were aware of his current condition related to his spinal cord injuries. He claims the "work assignment report" will cause Plaintiff irreparable harm hurting his chances for parole, and that these two defendants and others knew or should have known that their actions violated Plaintiff's First, Eighth, and Fourteenth Amendment rights. His grievance request for relief included an apology, suspension of Defendant Opanasenko for 7 days without pay, and removal of his negative job evaluation,

and no work assignments without his "personal outside doctor's" approval and no "retaliatory actions" against him. He even argued that "Qualified Immunity" should not shield the officials for civil damages.

At Step I, this was treated as a complaint only about the negative job evaluation which was upheld. Apparently at his interview on the grievance he "stated his only issue is that he was written a 'bad' work report that is not true".

At Step II, he complained that all of the individuals and issues were not addressed at Step I. The response indicated that "Classification" and Health Care" had cleared Plaintiff as "physically capable" for a light-duty detail like the handing out of recreation equipment. Yet, the grievance reviewer, Warden Bock, reasoned that because Defendant Opanasenko apparently signed the work evaluation both as "evaluator and Supervisor" it was improper. Thus, it was ordered to be removed from Plaintiff's file with Defendant Opanasenko allowed to "re-do" it and "have a supervisor sign it." Thus Warden Bock determined that the "[g]rievance is partially resolved at step II."

At Step III Plaintiff challenged the validity of the finding that he had been cleared by Health Care for the work assignment and claimed Warden Bock at Step II "attempt[ed] to side step and over look the issues at bar." He challenged Warden Bock permitting Officer Opanasenko to rewrite the work evaluation- because of the "unreasonable practice by the Department of Corrections and it[s] agents," which would include the Classification Director specifically named at Step I. Plaintiff again asserted that the "first, eight and fourteenth Amendments protests (sic, "protects") Plaintiff from such practice and harm." He

repeated his earlier demand for relief including his not being cleared for work without his personal Doctor's consent.

While not particularly "pretty" and quite conclusory, it cannot be said that this does not assert an Eight Amendment "deliberate indifference" claim against Defendants Morrison and Opanasenko and a First Amendment retaliation claim against Defendant Opanasenko. Plaintiff claims that Opanasenko harassed him and required him to perform the equipment handler position despite his injuries. Such allegations can he found sufficient for purposes of exhaustion. *Burton v. Jones*, 521 F.3d 569, 575 (6th Cir. 2003).

> [F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process. In describing the alleged mistreatment or misconduct, however, we would not require a prisoner's grievance to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. Rather, it is sufficient for a court to find that a prisoner's Step I problem statement gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.

*Id.* As explained, this "fair notice" standard does not require a prisoner to provide all the details of the alleged wrongdoing and is in accord with the legislative purposes of § 1997e(a) as stated in *Porter*. *Id.* A prisoner must simply provide a sufficient statement to inform prison

officials of his complaints and against whom they are directed.

While Plaintiff does not specifically name Morrison, the grievance specifically states that the "Classification Director," which is Morrison's position, and later Department of Correction "agents," required him to perform this work despite having knowledge that Plaintiff was incapable of its performance. Although the *Curry* case requires each defendant to be specifically named, where a plaintiff lists a particular position that is held by only one person, that requirement should be considered to be met.

Here, although the majority of Plaintiff's grievance does address the work report written by Opanasenko, Plaintiff also stated that his injury prevented him from performing the duties of an Equipment Handler and that both Opanasenko and the Classification Director (Morrison) required him to perform that job despite having knowledge of that fact. Mot. to Dismiss, Ex. A at 8-9. While not terribly specific, Plaintiff's grievance was sufficient to provide "fair notice" that he was grieving more than the work evaluation written by Opanasenko. He specifically raised claims that Opanasenko and Morrison should not have required him to perform the equipment handler position. The fact that the person writing the response to the Step I grievance did not address Plaintiff's allegations that Opanasenko and Morrison required him to perform work beyond his ability does not negate the fact that Plaintiff did raise those issues, albeit briefly, in his Step I grievance. He also notes that after informing Defendant Opanasenko of his condition, he was harassed and a ticket was threatened and a negative job evaluation written. This was coupled with a generalized claim that his First Amendment rights as well as his Eight Amendment rights

were violated. Thus, it is found that the exhaustion requirement is satisfied with respect to Defendants Opanasenko and Morrison, and defendants' motion should be denied in that regard.

## III. RECOMMENDATION

For the reasons stated above, IT IS RECOMMENDED that defendants' motion be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for failure to state a claim; however, his claims against Defendants Morrison and Opanasenko should not be dismissed at this time.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within ten (10) days of service of a copy of this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this report and recommendation. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the Court. The response shall address

specifically, and in the same order raised, each issue contained within the objections.

Dated: July 30, 2003
Ann Arbor, Michigan

/s/ Steven D. Pepe
Steven D. Pepe
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO JONES,

Plaintiff,

vs

Case No: 02-74336
Honorable Victoria A. Roberts

WARDEN BOCK, ET AL

Defendants. /

**ORDER ADOPTING REPORT AND RECOMMENDATION, IN PART**

(Filed Sep. 25, 2003)

## I. Introduction

This matter is before the Court on Defendants' 12(b)(6) Motion to Dismiss [Doc. 15]. Plaintiff, proceeding *pro se*, is a prison inmate whose complaint alleges that as a result of Defendants' indifference to his condition, he was forced into a physical assignment which aggravated previous injuries. Defendants move to dismiss for failure to comply with the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Plaintiff responded. Magistrate Judge Steven Pepe issued a Report and Recommendation recommending that certain of the Defendants – Bock, Chaplin, Konkle and Aldabaugh – should be dismissed for failure to state a claim. The Magistrate Judge recommended, however, that the claims against Defendants Morrison and Opanesenko should not be dismissed, finding that Plaintiff had exhausted constitutional claims. Both Plaintiff, and Opanesenko and Morrison, filed objections.

## II. FACTUAL BACKGROUND

The Court has conducted a *de novo* review of the pleadings and papers filed. The Court accepts the Magistrate's recommendation with respect to Bock, Chaplin, Konkle and Aldabaugh. However, the Court overrules the Magistrate's finding concerning Morrison and Opanesenko.

In order to effectuate the exhaustion requirement of 42 U.S.C. § 1997e(a), the PLRA, a prisoner must plead his claims with specificity and show that they have been exhausted, by attaching a copy of the applicable dispositions to the complaint, or, in the absence of any documentation, describe with specificity the administrative proceeding and its outcome. *Knuckles-El v Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion with the complaint can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F. 3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievance so prison officials can address the claims before a suit is filed in federal court. *Curry v Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

In his Complaint, Plaintiff states that he filed the necessary grievances, providing dates on which such grievances were filed, but he only states that the grievances "cit[ed] each instant in which [sic] plaintiff is alleging in this complaint." Compl. at 2. Plaintiff does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. This explanation is required, so that the Court can make a finding concerning the exhaustion requirement.

That Plaintiff attached the Step I grievance and the Step II and III appeals to his responses to the motion to dismiss, does not satisfy the exhaustion requirement. The *Baxter* court held that a prisoner cannot satisfy the exhaustion requirement by amending his complaint. *Baxter v Rose*, 305 F. 3d at 489. Further, the documentation regarding grievances supplied by the Defendants as part of their motion to dismiss does not cure Plaintiff's failure to properly plead exhaustion. The burden of production and proof is on the prisoner. And, the PLRA establishes a unique procedure under which the court, not the parties, is required to evaluate whether a claim on which relief can be granted has been set forth in the complaint. "Courts would be unable to screen cases effectively if plaintiffs were able, through, ambiguous pleading, to avoid dismissal of claims on which relief could not be granted." *Baxter*, 305 F. 3d at 490.

Based on the foregoing, the Court finds that Plaintiff's claim against these two Defendants must be dismissed as well, for Plaintiff's failure to state a claim upon which relief can be granted. The Court need not reach Defendants' argument that Plaintiff's Complaint must be dismissed for his failure to totally exhaust all claims. Judgment is to enter against Plaintiff in favor of all Defendants.

**IT IS SO ORDERED.**

/s/ Victoria A. Roberts
Victoria A. Roberts
United States
District Judge

Dated: Sep. 25, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO JONES,

Plaintiff,

vs

Case No: 02-74336
Honorable Victoria A. Roberts

WARDEN BOCK, ET AL

Defendants. /

**JUDGMENT**

(Filed Sep. 25, 2003)

In accordance with the Order entered on SEP 25 2003, **IT IS ORDERED** that Judgment is entered in favor of all Defendants.

Dated at Detroit, Michigan on SEP 25 2003.

David J. Weaver Clerk of the Court

David J. Weaver
Clerk of the Court

BY: /s/ Linda Vertrust

Approved:

/s/ Victoria A. Roberts
Victoria A. Roberts
United States
District Judge

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
**File Name: 05a0506n.06**
**Filed: June 15, 2005**

**No. 03-2576**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| **LORENZO L. JONES,** *Plaintiff-Appellant,* v. **BARBARA BOCK,** Warden, et al., *Defendants-Appellees.* | ) ) ) ) ) ) ) ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN **OPINION** |

**BEFORE: BATCHELDER and COLE, Circuit Judges; REEVES, District Judge***

**PER CURIAM**. Plaintiff-Appellant Lorenzo Jones appeals a district court order dismissing his action brought pursuant to 42 U.S.C. § 1983 for violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. For the reasons that follow, we **AFFIRM** the judgment of the district court.

## I. BACKGROUND

On November 14, 2000, Plaintiff-Appellant Lorenzo Jones sustained serious injuries from a motor vehicle

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

accident while he was in custody of the Michigan Department of Corrections. Jones alleges that after the accident, various prison officials required him to complete tasks which aggravated his injuries. He argues, *inter alia*, that this action constituted deliberate indifference to his serious medical needs in violation of the Eighth Amendment of the United States Constitution. The defendants sought dismissal of the complaint based on Jones's failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), codified at various sections of 28 and 42 U.S.C. The district court granted the motion. This appeal followed.

## II. ANALYSIS

The district court did not err in dismissing the claims against the prison officials based on Jones's failure to exhaust his administrative remedies. The PLRA requires plaintiffs to exhaust all administrative remedies before bringing an action in federal court regarding prison conditions. 42 U.S.C. § 1997e(a). This Circuit follows the "total exhaustion" rule, meaning that we must dismiss a complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. *See Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."). An action is one regarding prison conditions where it arises under federal law and concerns, *inter alia*, the "effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

This Court has held that in order to meet the exhaustion requirement of the PLRA, a prisoner must either attach a copy of his prison grievance forms to the complaint or state the nature of the remedies pursued and the result of each process. *See Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Jones stated in his complaint that he had exhausted his administrative remedies. However, he neither attached the grievance forms to his complaint nor described the remedies he pursued and the outcome. The fact that the defendant later provided evidence that Jones may have exhausted some of his claims is irrelevant under the PLRA and Sixth Circuit precedent. *See Baxter v. Rose*, 305 F.3d 486, 488-90 (6th Cir. 2002). Furthermore, even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims. *See Bey*, 407 F.3d at 806. Accordingly, Jones's prison-conditions claim was properly dismissed as he did not comply with the exhaustion requirement, as defined by this Court's precedent.

## III. CONCLUSION

For the preceding reasons, we **AFFIRM** the judgment of the district court.

**U.S. District Court**
**Eastern District of Michigan (Detroit)**
**CIVIL DOCKET FOR**
**CASE #: 2:02-cv-75133-DPH-VMM**

Williams v. Overton, et al

| Date Filed | # | Docket Text |
|---|---|---|
| 01/07/2003 | 3 | COMPLAINT (cm) (Entered: 01/07/2003) |
| | | * * * |
| 01/29/2003 | 13 | ORDER by Judge Denise Page Hood, referring all non-dispositive matters to Magistrate Judge Virginia M. Morgan and all dispositive motions for report and recommendation [EOD Date 2/3/03] (lg) (Entered: 02/03/2003) |
| | | * * * |
| 02/27/2003 | 20 | MOTION by plaintiff Timothy Williams to amend complaint [3-1] in order to add new defendants and bring clarity to the complaint; with exhibit and proof of service (jg) (Entered: 03/06/2003) |
| | | * * * |
| 04/11/2003 | 26 | RESPONSE by defendants to motion to amend complaint [3-1] in order to add new defendants and bring clarity to the complaint [20-1] with proof of service (kg) (Entered: 04/14/2003) |
| 04/15/2003 | 27 | MOTION by Bonnie Peterson, Mary Jo Pass, Markwell, P. Klee, D. Jamrog, William Overton to dismiss, for summary judgment with brief, exhibits A and B, affidavit and proof of service (kg) (Entered: 04/18/2003) |

* * *

| | | |
|---|---|---|
| 05/07/2003 | 32 | ORDER by Magistrate Judge Virginia M. Morgan denying motion to amend complaint [3-1] in order to add new defendants and bring clarity to the complaint by Timothy Williams [20-1] [EOD Date 5/15/03] (cm) (Entered: 05/15/2003) |
| 05/20/2003 | 33 | RESPONSE by Timothy Williams to motion to dismiss by defendants [27-1], motion for summary judgment by defendants [27-2] with attachments and verification of service (lg) (Entered: 05/28/2003) |

* * *

| | | |
|---|---|---|
| 07/22/2003 | 37 | REPORT and recommendation by Magistrate Judge Virginia M. Morgan that motion to dismiss [27-1] and motion for summary judgment by defendants [27-2] be granted; and the complaint [3-1] be dismissed [EOD Date: 7/23/03] (jg) (Entered: 07/23/2003) |

* * *

| | | |
|---|---|---|
| 09/25/2003 | 40 | OBJECTIONS by plaintiff Timothy Williams to report & recommendation [37-1]; with appendix and proof of service (dp) (Entered: 09/25/2003) |
| 10/31/2003 | 41 | ORDER by Judge Denise Page Hood accepting report & recommendation [37-1] granting motion to dismiss [27-1] and granting motion for summary judgment by defendants [27-2] and dismissing complaint without prejudice with proof of service [EOD Date 11/4/03] (nh) (Entered: 11/04/2003) |

| | | |
|---|---|---|
| 10/31/2003 | 42 | JUDGMENT entered by Judge Denise Page Hood for defendants against plaintiff, with proof of service [EOD Date: 11/4/03] (nh) (Entered: 11/04/2003) |
| 11/10/2003 | 43 | APPEAL by plaintiff Timothy Williams of orders [42-1] and [41-1] to USCA-FEE: not paid (do) Additional attachment(s) added on 2/6/2004 (LBeh,). (Entered: 11/14/2003) |

* * *

**General Docket**
**US Court of Appeals for the Sixth Circuit**
**#03-2507**

Williams v. Overton

| | |
|---|---|
| 11/21/03 | Prisoner Case Docketed. Notice filed by Appellant Timothy Williams. Transcript needed: n (jts) |
| | * * * |
| 1/2/04 | BRIEF filed by Timothy Williams for Appellant Timothy Williams. Copies: 07. Certificate of service date 12/28/03 Number of Pages: 16 ++appendices. [03-2507] (rgf) |
| | * * * |
| 2/17/04 | BRIEF filed by H. Steven Langschwager for Appellee William Overton. Copies: 07. Certificate of service date 2/10/04. |
| | * * * |
| 3/26/04 | APPENDIX filed by H. Steven Langschwager for Appellee William Overton. Copies: 05-400 pages. Certificate of service date 3/25/04 [03-2507] (rgf) |
| | * * * |
| 12/21/04 | CAUSE SUBMITTED on briefs to panel consisting of Judges Gibbons, Sutton, Edgar sitting on 2/03/05. [03-2507] (kal) |
| | * * * |
| 6/22/05 | OPINION filed: AFFIRMED the judgment of the district court. [03-2507], |

| | |
|---|---|
| | decision not for publication pursuant to local rule 28(g) [03-2507]. Julia S. Gibbons, Authoring, Circuit Judge, Jeffrey S. Sutton, Circuit Judge, R. A. Edgar, District Judge (E/TN). (jts) |
| | * * * |
| 7/14/05 | MANDATE ISSUED with costs to be recovered by Appellee William Overton. Amount: $718.50. [03-2507] return record (rgf) |
| | * * * |

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
Theodore Levin United States Courthouse
231 W. Lafayette, Room 564
Detroit, Michigan 48226
02-75133
Denise Page Hood
Magistrate Judge Morgan

***Prisoner Civil Rights Complaint for Cases Brought Under 42 U.S.C. § 1983***

(Filed Jan. 7, 2003)

| **Plaintiff's Information** | | | |
|---|---|---|---|
| Name<br>Timothy Williams-el | Inmate Number<br>173396 | | |
| Place of Confinement<br>Gus Harrison Correctional Facility A.R.F. | | | |
| Street<br>2727 E. Beecher St.<br>P.O. Box 1888 | City<br>Adrian | State<br>Michigan | Zip Code<br>49221 |

Any additional plaintiffs to this action should be listed on a separate 8½ x 11" sheet of paper and securely attached to the back of this complaint. Please provide names, inmate numbers, and addresses for each plaintiff.

| **Defendant's Information** ***(This information must be current.)*** | | |
|---|---|---|
| Name<br>William Overton, et al. | Position<br>Director, MDOC | |
| Street or P.O. Box Number<br>P.O. Box 30003, | | |
| City<br>Lansing, | State<br>Michigan | Zip Code<br>48909 |

*Are you suing this defendant in his/her personal capacity, official capacity, or in both capacities?*

☐ Personal ☐ Official ☒ Both

Any additional defendants to this action should be listed on a separate 8½ x 11" sheet of paper and securely attached to the back of this complaint. Please provide their names, positions, and current addresses, and the capacity (personal or official) in which you are suing the defendants.

## I. PREVIOUS LAWSUITS

Have you begun any other lawsuits in state or federal court relating to your imprisonment?

YES ☒ NO ☐

If "YES", complete following section; if "NO", proceed to Part II.

- ***Please list all prior civil actions or appeals that you have filed in federal court while you have been incarcerated.***[1]

| | |
|---|---|
| *1)* | *Docket Number:*<br>Civil No. 98-CV-74042 |
| | *Name of Court:*<br>Eastern District of Michigan |
| | *Parties (Caption or Name of Case):*<br>Williams-el-173396 V. B. McLemore, et al, |
| | *Disposition:*<br>Pending |

| | |
|---|---|
| *2)* | *Docket Number:* |
| | *Name of Court:* |
| | *Parties (Caption or Name of Case):* |
| | *Disposition:* |

[1] This notification is pursuant to 28 U.S.C. § 1915(g).

| | |
|---|---|
| 3) | *Docket Number:* |
| | *Name of Court:* |
| | *Parties (Caption or Name of Case):* |
| | *Disposition:* |

***Note: Any additional civil actions should be listed on a separate 8½ x 11" sheet of paper.***

## II. ADMINISTRATIVE REMEDIES

1. If you are in the custody of the State of Michigan or one of its subdivisions, did you:

| | |
|---|---|
| File a grievance with the Step 1 Grievance Coordinator: | YES ☒ NO ☐ |
| Appeal to the Step 2 Grievance Coordinator? | YES ☒ NO ☐ |
| Appeal to the Step 3 Grievance Coordinator? | YES ☒ NO ☐ |
| Seek a rehearing? | YES ☐ NO ☒ |
| Seek State Circuit court review of a misconduct hearing? | YES ☐ NO ☐ |

*If you did not take one or more of the steps, please explain why:*

_____

_____

2. If you are a federal detainee, prisoner, or parolee and if your claim concerns parole, did you appeal to the National Appeals Board of the United States Parole Commission?

YES ☐ NO ☐

*If not, explain why:*

_____

_____

3. If you are a federal detainee, prisoner, or parolee, and if your claim involves something other than parole, did you:

| | | |
|---|---|---|
| Attempt to resolve your complaint informally? | YES ☐ | NO ☐ |
| File a formal complaint? | YES ☐ | NO ☐ |
| Appeal to the warden? | YES ☐ | NO ☐ |
| Appeal to the Regional Director of the Bureau of Prisons? | YES ☐ | NO ☐ |
| Appeal to General Counsel for the Bureau of Prisons? | YES ☐ | NO ☐ |

*If not, explain why:*

## III. STATEMENT OF FACTS

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include the names of other people, dates, and places involved in the incident. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim on blank 8½ x 11" sheets of paper and attach them to the last page of this complaint.

See Attached

## IV. RELIEF

State here briefly and exactly what you want the Court to do for you.

See Attached

**I declare under penalty of perjury that the foregoing is true and correct.**

December 13, 2002 (Date) /s/ Timothy Williams (Your Signature)

1. The plaintiff, Timothy Williams-El, #73396, was incarcerated at Standish Maximum Correctional Facility (S.M.F.), located at 4713 West M-61; Standish, Michigan 48658. This plaintiff is currently being held at Gus Harrison Correction al Facility [level II (A.R.F.)]. The majority of plaintiff complaints occurred while being incarcerated at this facility.

2. Defendant, Williams Overton, the Director of Michigan Department of Corrections is responsible for the overall operation of this agency (M.D.O.C.). Plaintiff believes he is a, liable in both his official and individual capacity.

3. Defendant, Dr. Pramstaller, is the Regional Medical Officer for the Bureau of Health for the Michigan Department of Corrections (CMS). Defendant, office is located at 2378 Woodlake Drive; Okemos, Michigan 48864. Defendant an employee for the Medical Service, is responsible for ensuring the provision of adequate medical care. Dr. Pramstaller, has constantly evade plaintiff request to see a medical specialist. Defendant ineptness has cause plaintiff

unnecessary hardship and pain, this is due to its prolonging of medical treatment and it has continuous stagnate by not allowing the plaintiff the medical service of needed surgery. On August, 30, 2002, Dr. Pramstaller, agreed with this plaintiff that plaintiff's ongoing pain stems from the contracture in his muscles. This doctor acknowledge the only solution to controlling the spreading of the tumors it must be control by tendon lysis. Plaintiff was also informed by Defendant that he was going to seek the advice and opinion of another specialist. Plaintiff haven't been forward or discuss with the plaintiff. Two months has elapse since Dr. Pramstaller, has had in his possession valuable information concerning the outside specialist medical opinion. As the result of waiting patiently for a response plaintiff tumors has spread tremendously since Dr. Pramstaller had posses the information fax to his office on October 2, 2002. Dr. Pramstaller, original fax to the specialist was sent August 30, 2002. No treatment has been provided to this plaintiff as the result of this specialist professional opinion. Therefore, at this moment, this plaintiff is suing this defendant in both his individual and official capacities for his failure to treat this plaintiff medical condition.

4. Defendant, D. Jamrog, the Warden of ~~Adrian~~ [Parr Highway Correctional Facility 2727 E. Beecher, Adrian, MI 49221] (A.T.F.) is responsible for the institutional operation and the function of the facility. He is also responsible for enforcing and making sure that every department under his supervision enforce and follow the procedures governed by policy. His duties are intertwine with authority to providing adequate medical care. These departments are obligated to insure that it implement polices and provide medical care to its population. The

Michigan Department of Corrections does not tolerate any systematic denial of medical care. Mr. Jamrog liable in both his individual and official capacity.

5. Defendant, P. Klee, ADW of Housing, is a subordinate of Defendant D. Jamrog, who is employee at the Gus Harrison Correctional Facility, located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. This defendant is being sued in both individual and official capacity.

6. Defendant, Mr. Markwell, who is employed as an Unit Corrections Officer at Gus Harrison Correctional Facility, located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. Defendant works under the supervision of Defendant's D. Jamrog, and P. Klee. Defendant is being sued in both his individual and official capacity.

7. Defendant, Mary-Jo Pass, works in the capacity of Asst. Deputy Warden of Programs at Gus Harrison Correctional Facility, located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. She is a subordinate of Defendant D. Jamrog. This defendant is also being sued in both her individual and official capacity.

8. Defendant, Bonnie Petterson, the Health Facility Manager of Gus Harrison Correctional Facility oversees health care. Defendant department local is located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. She as well is being sued in both her individual and official capacity.

9. All the above mentioned defendant's have acted unprofessional and they have continue to exemplify these tactics in the handling of these matters. The color of state and federal law was violated by the Defendant's creating unconstitutional tactics and procedures. Plaintiff is making this

complaint because the defendant's has failed to provide the plaintiff with adequate medical service.

10) PRELIMINARY STATEMENT:

This is a Civil Rights Action filed by Timothy Williams-El, #173396, a state prisoner, for damages and injunctive relief under 42 U.S.C. 1983, alleging that while in the care of the Michigan Department of Corrections (MDOC) and specifically housed at Gus Harrison Correctional Facility (ARF); that the contract service provider for Health Care (H/C), alone or in conjunction with (MDOC) and (ARF) have failed to deliver services of a medical nature to this Plaintiff.

11) Resulting in *Irreparable Harm*. The care offered and provider is patently, insufficient to remedy the need which can only be met through surgery and rehabilitative therapy and accommodations single cell.

12) The medical reports show several evaluations, all indicating and recommending the surgery and therapy, brace etc. They show corrections medical service (CMS) denying this in a grossly, negligent manner with no real justification, simply listing "Not enough information provider" and "where is the old brace," etc.

13) That these to match the MDOC policy mandate care, which is to mirror community standards.

14) That in my particular case, we know these community standards are as I was evaluated by a community doctor who specialized in my care, at the St. Joseph Medical Facility which specializes in Hand surgery of this type.

15) That CMS form (CHJ-408) dated March 25, 2002; mentions in a disingenuous and fallacious manner, in CMS's decision space, ". . . the dictated note indicates the hazards of this and the probable futility of it. . . . Hand surgery reveal will accomplish nothing. . . ." This is utterly shocking and alarming, giving the specific mandates the MDOC must by federal law and U.S. Constitution function under.

16) The CMS shows an undeniable set of facts, that either the CMS's "decision" person(s) in ignorant of current community standards and humane decency; or that they are only concerned with money; or that they are ignorant of medical care all together? And in reality, any choice they list is condemning to them, and violative of the U.S. Constitution prohibition on Cruel and Unusual Punishment.

17) As to my hand, first, the defendants should use common-sense and the record by the doctors and specialist show real and positive benefits to the surgery on the hand (and do not loose sight of the needs for arm's surgery)! And these positive benefits include, but are not limited to: (A) reduction of pain; (B) The hand being flexible void of pain, thus resulting in a more natural look, and the fact it will be of some use and assistance real in "ADL's". For the record, this condition effects my ADL's gravely in a very negative manner!

18) As to the disingenuous note of "futility," the above shows the falsehood thereof, and as for the comment of "hazards of this" surgery, they are not numerically listed, and even having your tonsils out poses real "hazards."

19) I contend that to have the specialists at the Hand Surgery Clinic perform the needed surgery to reduce pain

and add functionality and usability of the hand is minimal at best, as all persons know the listing "hazards" is a precaution.

20) That the obvious ignorance of medical practices and of English language by this respondent whom denied this request, fails to see, and again, (A) the listing of pain; (B the positive benefits of this surgery. Thus, Dr. Hoffman, in an animated reply states in large print and with underlining (out of sheer disbelief and great frustration). "AGAIN the request is to have surgery to relieve *PAIN* NOT (just) *correction* of the *hand" so court should see the crime and ignorance and conspiracy,* the real constitutional violate practice herein by CMS and MDOC!

21) In step-one reply of denial, CMS again is disingenuously listing that the surgery is futile and "dangerous," this based not upon any real facts, not upon any statistics, but upon mis-application of the standard precautions. Any standard of care is highly successful care where precautions are routinely listed!

22) That Correction Medical Services (CMS) Dr. G. Pramstaller (all others in both parties John & Jane Doe's at present). Spins and denies my needed care. I suffer from a multitude of injuries relating from the tumors, real physical ones, mental ones and emotional ones. This is not policy complaint to either the humane living conditions and treatment policy, not any of the Medical Policies. I grieved per right of the alleged violation of my "condition of confinement."

23) The respondent at step-three states that "the medical opinions from professionals, such as doctors and nurses, will not be questioned by this office due to the technical

expertise of the profession. (see Grievance 3rd step SMF-02-06-1337-12d exhibit ["A"]).

24) That "deliberate indifference to serious medical needs of prisoners" is cruel and unusual punishment. The complaint alleges facts that state a constitutional claim under this standard.

25) The need of Surgery and Therapy!

Mr. Williams-El, being a qualified individual with a handicap under the ADA, needs surgery to relieve immense pain and suffering, and to straighten a wrist, then to receive therapy as determined by Medical Expert Surgeon Khawaja H. Ikram, D.O. #10193 and also of K. Nimar Ikran, D.O. #11103 from DWH, Dr. J. Hoffman, D.O., from SMF; and Doctor Raymond C. Noellert, M.D./cak of the

26) ACCESS TO CARE PROSCRIBED

Plaintiff has attached documents (medical papers) as exhibits to show this Court that the defendant's could have provided plaintiff with medical assistance if they would have sought this option. Instead, of doing so they choose to squabble over words. Defendant's own medical staff presented enough plethora of paperwork that proves that plaintiff medical condition can only be cure if plaintiff had a surgery and follow-up treatment of therapy.

27) Defendant's behavior of "in fighting" between the Department of Correction and the separte entity of the agency the Medical Service Provider shows a willful and disregard and reckless use of treatment for the plaintiff. These methods caused plaintiff from not receiving a reasonable health care.

28. The delays exhibit by the defendant's cause serious risks to the plaintiff. These delays are unnecessary because they are the ones who authorized and performed the surgery on plaintiff hand on March 29. 2001. These same defendant's will not approved another surgery which is validated by the medical files.

29) Plaintiff has sustained other injuries as a result of the delays and denial of proper treatment. Plaintiff has incurred the following injuries in respect to:

A. Permanent damages due to the growing tumorous which has cause the tendons and ligaments in the wrist to become rigged and the arm shorten in length. Also, atrophy of the hand, wrist, and forearm muscles. There is some clarification of the muscles as well. If not properly treated more severe injury will occur if not treated.

B. Plaintiff has suffered continuous pain and myriad of effects from the loss of activity, loss of sleep resulting in no quality of life, ect.

3. Plaintiff has suffered emotional and mental stress.

4. Plaintiff has been subjected to humiliation, degradation, and his constantly fear knowing the condition is getting worse (deformities). The *community orthopedic surgery & huron valley hand surgery* clinic, all support this surgery, have done evaluations and/or approved of and performed this surgery prior. Please see the attached exhibits on the matter, they are comprehensive, show the success of the prior similar surgery, the recommendations for this presently delayed surgery, the failed approval via CMS for it, and more.

> Plaintiff asks this Court to enact its powers to forego further proceedings, as defendant's decision to deny surgery for the relief of pain and straightening of wrist and hand, is so egregious as to "shock the conscience" of an evolving society, and the evolving medical standards of that society. Plaintiff asks this Court to rule immediately, as the decision to deny surgery and therapy is so palpably and grossly violative of fact and logic that it evidences perversity of will, defiance of judgement and an exercise of perverse passion. There was a hearing held, without me present, with Dr. Pramstaller and other staff of the MDOC and CMS in which the decision was to deny the surgery. Thus, this Administrative Hearing has resulted in harm to me.
>
> intervening or participation in this matter.

30) The defendant's are required to follow polices, rules, regulations and honor the laws of the State of Michigan and United States of America by acting accordingly.

31) On March 29, 2001, surgery was performed on the plaintiff to removed the Tumors (Hemangioma). This was his first surgery and it was successful. See Exhibit ["B"] attached.

32) On August 8, 2002[1], went to Duane L. Water for a follow-up care surgery. The physician decided to remove Tumors (Hemangioma) from both finger and hand. Hoping to detour the wrist from curving back into the immobile position. And to provide a better extension (straighten the wrist). See Exhibit "C" attached.

33) On October 23, 2001, Plaintiff was referred to a physical therapy pending surgery. Therapy recommended a hand and arm brace. See Exhibit D" attached.

34) On January 11, 2002, Plaintiff, was recommended and referred to see an outside specialist at St. Josephs Hospital located in Ann Arbor, Michigan. Dr. K. Nimr Ikram, D.O. #1103 supposed to been the specialist. See Exhibit "E" attached.

35) On January 29, 2002, a referral too see Dr. Nollert a Hand Specialist was approved. See Exhibit "F" attached.

36) On March 5, 2002, Plaintiff was evaluated by Dr. Nollert (M.D.) at the Orthopedic clinic, at St. Josephs Hospital in Ann Arbor, Michigan. Dr. Noellert, recommended surgery and he also explained to the plaintiff that he can correct the arm by extending plaintiff wrists. Which will relieve the ongoing pain from occurring again. See Exhibit "G" attached.

37) On March 25, 2002, after receiving the evaluation by Dr. Noellert. C.M.S. on March [25] 2002, denied the recommendation by Dr. Noellert that surgery can correct the problem. Dr. Hoffman at Southern Michigan Facility (S.M.F.) appealed C.M.S. decision denying surgery. He felt as well that this surgery is necessary. See Exhibit "H" attached.

38) Plaintiff medical need is a serious matter where certain physicians has agreed that surgery is require. These are the following doctors who agreed with the surgery: Dr. J. Hoffman; Khawaja H. Ikram, [D.O. #10193 (Medical Expert)]; Dr. K. Nimar Ikaram, [D.O. #11103 (Medical Expert)]; Dr. Raymond C. Noellert, [M.D./CAK] Hand Surgery Specialist at Community Orthopedic at St. Josephs Hospital.

39) Defendant's Dr. Pramstaller, Correctional Medical Services have deliberated cause indifference to a serious

medical need. The parties involved are John Engler (Governor of Michigan) and Jane Doe(s). All defendant's which are mentioned in this action suit because they have prevented Plaintiff from receiving the recommended medical treatment.

A.D.A. VIOLATION

40) Plaintiff is alleging that the official [defendant's] at Adrian Correctional Facility (A.R.F) denied him the right to a handicap cell (single). The failure to comply to plaintiff reasonable request of adequate living condition which would increased plaintiff mobility and protect him from injuries violates his constitutional rights. Such discrimination procedures implemented by this facility is inhumane.

41) On August 7, 2002, plaintiff was transferred to A.R.F. where Defendant Jamrog is the Warden. Plaintiff, sent a request seeking addition Special Accommodations to his office in which it was denied. Therefore, plaintiff sought administrative relief by filing a grievance. Plaintiff, grieved the matter through step 1 to step 3, but it was to no avail. See attached Exhibit "I" [ARF-02-08-1417-28H (Grievance Identifier Number)].

42) On and about August 3, 2002, Plaintiff received a response from Mary Jo-Pass (defendant) the Assistant Deputy Warden of Program concerning plaintiff request for A.D.A. treatment. In her memo dated August 30, 2002, it states as following, "a review of your medical files indicates a current special accommodation notice. I spoke with (ARUS) Beecher about this accommodation and your should received those things as listed through his office. Further, a work order has been submitted to have maintenance extend the length of time, the faucets run, when

pushed. If you have any questions or concerns, feel free to 'kite me'". On September 4, 2002, plaintiff request of A.D.A treatment, Plaintiff submit in writing, outlining all his disabilities on standard "Prisoner Accommodation" form (CAJ-707). Defendant called plaintiff out on September 9, 2002, to discuss the problems and discuss any miscommunication between the parties. Out that meeting she still concluded that I do not meet the qualification of being place in a handicap single cell. Plaintiff sought administrative relief on this matter, but as usual this administration agreed with the previously decision. See attached Exhibit 'J' [Grievance Identifier Number: ARF-2002-09-1509-28H].

43) After returning from the meetimng with Ms. Mary Jo-Pass, I brought this complaint to the Unit A.R.U.S. (Mr.M. Risley) and discussed the meeting I had with Ms. Mary Jo-Pass. In our conversation plaintiff directed his attention to prisoner's Guidebook, page 26, where Director of (MDOC) William Overton stated, "a prisoner should make a request for a reasonable accommodation to the Unit Manager or the Department (A.D.A.) coordinator in Lansing, located at P.O. Box 30003, Lansing, Michigan 48909." Case Manager (Unit A.R.U.S.) Mr. M. Risley acted appropriate under the circumstances and moved the plaintiff to a handicap (single) cell. Plaintiff still pursued with the filing the grievance on Mary Jo-Pass (Defendant) for failure to act accordingly. See attached Exhibit 'J' dated September 9, 2002.

44) The following day (09-09-02), Unit Officer (Defendant) Markwell made a statement to the plaintiff in a derogatory, and demeaning way. He stated: "How in the fuck you get a handicap cell and who assisted you." He further stated, "There's nothing wrong with you, you are

capable of assisting your fucken-self." This defendant's remarks were humiliating and degrading, were meant to harm this plaintiff. Plaintiff sought grievance procedure against this defendant. See attached Exhibit 'K' [Grievance Identifier Number: ARF-02-09-1507-28C].

45) Plaintiff believes Officer Markwell (Defendant) intentionally interfered with plaintiff health and Case Manager Mr. M. Risley decision to place him in a handicap (single) cell. Officer Markwell (Defendant) contacted Health Care Service and proceeded up the local administration (A.R.F.) to Deputy of Housing (Mr. P. Klee) to have the plaintiff moved out of the handicap cell [131 to 157-B-3] to a non handicap cell. Both Defendants (Mr. Markwell and P. Klee) conspired together to intentionally causing plaintiff duress, mental anguish, and physical pain. Their actions interfered with the MDOC Director's *mandate* and Case Manager Mr. M. Risley decision to accommodate this plaintiff. [See attached Exhibit 'L' Grievance Identifier Number: ARF: 02-09-1508-28H].

Facts:

46) On September 18, 2002, plaintiff tried to resolved this matter by making a formal request to Health Care Service. Plaintiff presented information to Ms. Bonnie Petterson via kite system. Ms. Petterson substantiated her position by stating: "Only wheelchair prisoners are entitled to a (single) handicap cell. Plaintiff filed an administrative grievance against this defendant. See attached Exhibit 'M' [Grievance Identifier Number: ARF-2002-10-1646-121-I].

47) Plaintiff has made good faith effort by attempting to resolve this matter via letters (kites), medical kites, and

the filing of grievance. As of result, no suitable remedy were provide in the administrative process.

48) All of the above named defendants were fully aware of plaintiff being handicap. They even acknowledged that plaintiff situation does fall within the category of being legally handicap under the A.D.A. standard. But in their own opinion, they felt that plaintiff isn't entitled to those benefits. Every defendant pertaining to this matter failing to do anything to resolve this matter. See attached Exhibits [Special Accommodation dated 1997 thru 2002, (form attached)]. 1-10.

49) On or about October 20, 2002, plaintiff was injured by his cell-mate. His cell-mate accidentally slammed into plaintiff's entire arm and hand. Which has caused plaintiff to developed new tumors. See attached Exhibit '9' (Health Care Kite). After suffering injuries to the arm and hand that has been classified as handicap by the medical profession. Plaintiff, still hasn't been placed in a handicap (single) cell after suffering an injury. Plaintiff further believes the lack of mobility of living in a double-bunk cell, plaintiff's cell-mate caused the injury.

50) The defendant failure to provide plaintiff with the proper living condition and medical treatment had caused him physical, emotional and mental stress. Also, defendant's failure to make a speedy respiration has caused the plaintiff more injuries.

Claim For Relief

The failure of defendant's William Overton; Dr. Pramstaller, head of Correction Medical Services (CMS), Jan Epp, head of Bureau of Health Care Service; at 3400

Cooper St.; Jackson, Michigan 49201 and C.M.S. John and Jane Doe's has been determined to be responsible for their *Deliberately Indifferent* of complete denial and delays tactics in prescribing surgery, therapy, and follow-up care. Which has caused plaintiff to have suffer both physically and mentally with emotional defects. Their deliberate indifference to the plaintiff cause serious medical needs not to be attend to. Thus, violating the Eight and Fourteenth Amendment of the U.S. Constitutions. Plaintiff believes the defendant's actions shall be construe as Negligence and Malpractice. Any doctor/nurse working as a skill professional is liable for malpractice (misconduct) due to their practice of medicine.

The failure of defendant's D. Jamrog, (Warden), Bonnie Petterson, (Health Manager), Mary Jo-Pass, (A.D.W. of Programs), and John and Jane Doe(s) should be determined to be responsible for their deliberate indifferent acts of discrimination that was based on Plaintiff's disability. This plaintiff was also denied of all the benefits of adequate services and the denial of single handicap cell. Due to these denials has cause plaintiff to he subjected to injuries of physical, mental, emotional distress. Which is the result of the denial medical treatment (special accommodations) that constitutes deliberate indifference. Both Eighth and Fourteenth Amendment of the U.S. Constitution provides Equal Protection of the Law. This is also supported by the American Disabilities Act (A.D.A.) and Rehabilitation Act.

The actions of the following defendant's were intentionally exemplify for the sole purpose of interring with Case Manager Mr. Risleys, decision to placing plaintiff in handicap (single) cell. P. Klee (A.D.W. of Housing) and Markwell, Unit Officer (C/O) conspired to together to

obstruct the "course of justice" with the intention of denying Plaintiff equal protection of the law. Thus, violating plaintiff Eighth and Fourteenth Amendment right under the American Disabilities Act (A.D.A.), and Rehabilitation Act.

Relief Requested

Wherefore, Timothy Williams-El, (Plaintiff) request that the Court grant the following relief:

A) Issue of declaratory judgment stating that:

1. The physical abuse of the plaintiff by defendant's Overton, Dr. Pramstaller, (C.M.S.), Jamrog, Petterson, Klee, Markwell, and C.M.S. John and Jane Doe(s) as determined to be responsible for the violating plaintiff rights guaranteed by the Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

2. Defendant's Overton, Dr. Pramstaller, Jamrog, all failed to take precautionary actions to curb the physical abuse received by this plaintiff. This, is a violations of the Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

3. Defendant's Overton, Dr. Pramstaller, Jamrog, also failed to provide adequate medical care (single handicap cell) ect. Defendant's violated plaintiff Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

4. Defendant's Overton, Dr. Pramstaller, Jamrog, failed to act on the information. In the circumstances, where the prisoner has filed a grievance.

The grievance facilitators on many occasion failed to hold the individual responsible where there was a legitimate claim presented by the prisoner. Due to acting appropriately constitutes a TORT NEGLIGENCE under the Michigan Laws.

5. The failure of defendant's Dr. Pramstaller, Corrections Medical Services (C.M.S), and (C.M.S) John and Jane Doe(s) shall be determined responsible for not providing surgery on plaintiff's hand and arm and for not allowing plaintiff to participate in therapy. Therapy is necessary to counteract plaintiff deformities. The failure to provide medical care and treatment constitutes a tort negligence.

B) Plaintiff humbly asks this Court to ISSUE AN INJUNCTION ordering against defendant's Dr. Pramstaller, Overton, or C.M.S. or any of their agents to:

1. Immediately arrange for Plaintiff to have surgery to remove the growing tumors from his fingers, hand, and make sure his wrist and arm is straighten to the point medical requirement. This surgery should been done by Dr. Raymond C. Noellert, M.D. who is qualify as hand specialist at Community Orthopedic Hospital at St. Josephs.

2. That no delays shall be tolerate on part of the defendant's if an order is issue to allow Dr. Raymond, M.D. at St. Josephs Hospital to perform the surgery.

C) Award compensatory damages in the following amounts:

1. Hundred Thousand Dollar ($100,000), jointly and severally against defendant's John Engler (Governor), Overton, Pramstaller, and C.M.S. John and Jane (Doe's) as determined to be responsible for he physical and emotional inures incurred as

the result of defendant's for denying plaintiff surgery and rehabilitation.

2. Hundred Thousand Dollar ($100,000), jointly and severally against defendant's, D. Jamrog, Bonnie Petterson, Mary Jo Pass, for their denial to accommodate plaintiff with a single handicap cell. As result of not being provide this special accommodation I have suffered drastically both physical and emotionally. Defendant's violated plaintiff Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

3. Hundred Thousand Dollar ($100,000), jointly and severally against defendant's, Klee, and Markwell for intentionally interfering with Administrative Policy when case manager Mr. Risley follow procedures by adhering to plaintiff request of special accommodation (single handicap cell). Defendant's violated plaintiff Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

D) Grant any relief as this Court deems appropriate.

E) Jury Trial if needed.

The Plaintiff Timothy, Williams-El, requests trial by jury of all issues deems to be triable.

Respectfully submitted,

/s/ Timothy Williams-el

Timothy Williams-El, #173396
Gus Harrison Corr. Fac.
2727 E. Beecher St.
P.O. Box 1888
Adrian, Michigan 49221

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

TIMOTHY WILLIAM-EL, #173396
PLAINTIFF

NEW CASE: _____

VS.

WILLIAM S. OVERTON, DIRECTOR ET AL.,
DEFENDANTS

_____/

## AFFIDAVIT OF MEDICAL CARE

1) I, TIMOTHY WILLIAMS-EL, SO HEREIN AFFIRM THAT I HAVE REASONABLY SOUGHT THE REQUIRED AND YEAH, PRESCRIBED TREATMENT OF SURGERY; THERAPY AND SPECIAL ACCOMMODATIONS VIA THE ADMINISTRATIVE REMEDIES AVAILABLE WITHIN THE MDOC AND CMS. THE ATTACHED EXHIBITS SHOW THIS TO BE TRUE.

2) I HAVE RECEIVED NO POLICY AND NO LAW AND CONSTITUTIONAL COMPLAINT RESOLVE AND CARE; MY CONDITION WORSENS, AND THE PAIN AND ASSOCIATED PHYSICAL, MENTAL AND EMOTIONAL HARM CONTINUE WITHOUT RELIEF AND RESOLVE.

3) I ATTACHED GRIEVANCES WHICH I CERTIFY THAT I HAVE SENT TO STEP ONE, TWO AND THREE, BUT THAT DUE TO THE URGENCY OF THE ISSUE AT HAND (PARDON THE PUN) OF THE REALITY OF THE WORSENING OF THE CONDITION TO MY HAND, WRIST AND FOREARM, THE REAL POSSIBILITY OF IRREPARABLE HARM CONTINUING AND RESULTING FROM THE DELAYS AT PRESENT AND IN THE FUTURE.

4) THAT THE ATTACHMENTS EXHIBITS ARE THERE ON DOCUMENTS; THERE IS NO ISSUE IN DISPUTE UNDER THE LAW; THE

OUTSIDE EXPERT SPECIALIST RECOMMENDS THE SURGERY; THE MDOC'S OWN DOCTORS RECOMMEND THE SURGERY. I NEED THE SURGERY, AND SPECIAL ACCOMMODATIONS, A SINGLE CELL.

5) THAT THE ATTACHED EXHIBITS ARE TRUE COPIES OF THE MICHIGAN DEPARTMENT OF CORRECTIONS (MDOC).

I, TIMOTHY WILLIAMS-EL, SO HEREIN AVER TO THE ABOVE UNDER PENALTY OF PERJURY ON THIS DECEMBER 13, 2002

/s/ Timothy Williams
TIMOTHY WILLIAMS, #173396

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY WILLIAMS-EL,

Plaintiff,

v.

WILLIAM OVERTON, GEORGE PRAMSTALLER, DAVE JAMROG, PAUL KLEE, CHAD MARKWELL, MARY JO PASS and BONNIE PETERSON,

Defendants. /

CIVIL ACTION NO. 02 CV 75133 DT

DISTRICT JUDGE DENISE PAGE HOOD

MAGISTRATE VIRGINIA M. MORGAN

# REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION FOR DISMISSAL OR SUMMARY JUDGMENT

(Filed Jul. 22, 2003)

## Introduction

This is a *pro se* action based on 42 U.S.C. § 1983. Timothy Williams-El is an inmate in the custody of the Michigan Department of Corrections ("MDOC"). The parties named as defendants in the complaint are William Overton, MDOC Director, David Jamrog, Warden of MDOC's Adrian Correctional Facility; Mary Jo Pass and Paul Klee, MDOC Assistant Deputy Wardens; Chad Markwell, MDOC Resident Unit Officer; George Pramstaller, D.O., Chief Medical Officer of MDOC's Bureau of Health Care Services; and Bonnie Peterson, formerly an MDOC Health Unit Manager.

The complaint contains two claims. Plaintiff alleges that he was improperly denied a surgical procedure and related post-operative therapy to correct a medical problem with his right arm. He also asserts that he was wrongfully denied a single-occupancy cell to accommodate his impairment. (These claims will hereafter be referred to as, respectively, the "Medical Claim" and the "Accommodation Claim.") He seeks declaratory, injunctive, and monetary relief.

Process has been served on all parties except Dr. Pramstaller. The Michigan Attorney General has entered an appearance on behalf of the parties served with process, who will hereafter be collectively referred to as "Defendants."

The complaint was filed on January 7, 2003. In lieu of an answer, Defendants filed a motion on April 15, 2003, seeking dismissal or summary judgment under F.R.Civ.P. 12 and 56, respectively. The Court recommends that the motion be granted.

## Discussion

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

"To assert a § 1983 claim, a plaintiff must prove that he was deprived of a right secured by the Constitution or the laws of the United States and that the deprivation was caused by a person who was acting under color of state law." *Mays v. City of Dayton*, 134 F.3d 809, 813 (6th Cir. 1998). The sources of the federal right which Plaintiff invokes are Eighth and Fourteenth Amendments to the Constitution, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).

## I. Medical Claim

As explained in a report dictated by Raymond Noellert, M.D., and dated March 5, 2002, Plaintiff "has apparently had noninvoluting cavernous hemangiomas in the right upper extremity since birth." Exhibit G of Complaint (the "Noellert Report"). A "hemangioma" is a "congenital anomaly, in which proliferation of blood vessels leads to a mass that resembles a neoplasm." Stedman's Medical Dictionary (26th ed. 1995). Dr. Noellert observed that Plaintiff held his right arm "with the wrist in a tremendously contracted position of nearly 90 degrees, from which it cannot be passively extended." Noellert Report. Plaintiff related to Dr. Noellert that he is "bothered by . . . pain, swelling of the hemangiomas, and . . . tremendous inconvenience from the markedly fixed posture of the hand, and inability to use the hand in any way." *Id.* Dr. Noellert's "impression" after examining Plaintiff was "multiple noninvoluting cavernous hemangiomas right

upper extremity, with secondary wrist joint and musculotendinous digital contracture."[1]

A year prior to Dr. Noellert's examination, in March of 2001, surgery was performed to remove a hemangioma from Plaintiff's right hand. Exhibit B of Complaint. Plaintiff indicated that pain relief was the primary objective of this procedure. *See* Noellert Report ("He recently had an hemangioma . . . removed . . . for an indication of pain.") Plaintiff apparently had similar procedures performed "from birth to age 10." *Id.*

In January of 2002, Plaintiff was evaluated by K. Nimr Ikram, D.O. Dr. Ikram's assessments were "hemangioma of the right hand and forearm," and "flexion contracture of the right wrist." Exhibit E of Complaint. The doctor's "Plan" reads as follows:

> The clinical findings and examination were discussed with the patient. He was asked exactly what he wants with the right arm and he states that he wants the wrist to be straightened and wants the hemangiomas removed. He was told that this would be a large complicated surgical procedure and he may not ever get the function of his fingers back. He states that he wants whatever done to get wrist strengthening and to remove the hemangiomas. The patient was told at this time that considering he wants this last surgery to straighten out his wrist and get function back in his finger, we would recommend that he go to St. Joseph hand surgeons, who deal with

[1] Plaintiff explained to Dr. Noellert that "he has a condition called Kasabach-Merritt syndrome." Noellert Report. Dr. Noellert does not explicitly accept or reject that diagnosis.

> this on a daily basis. The patient agrees and will go to . . . St. Josephs.

*Id.*

It was with Dr. Ikram's referral that Plaintiff was seen by Dr. Noellert in March of 2002. The report from Dr. Noellert concludes:

> Any type of surgical correction would be a fairly extensive undertaking. It may not be possible to correct his wrist contracture without considering fusion, with proximal row carpectomy. Digital lengthening would likely require something like a superficialis to profundus transfer with step cut lengthening of his wrist flexors. This could be done in association with removal of his hemangiomas. Obviously this is a lot of surgery, with significant potential for infection, skin slough, and nerve or vascular injury. It is even possible that he could lose his hand as a result of attempted treatment. Either [*sic*-even if?] everything goes well, with the posture of the hand being improved, I would not expect much in the way of purposeful digital flexion over strength, with the hand largely functioning as a passive assist.
>
> This was explained at length in detail to the patient today. He is adamant that he understands this and would like to proceed as he simply cannot stand the hand the way it is. On that basis he will receive authorization for treatment.

Noellert Report.

Following Dr. Noellert's examination, the "Medical Service Provider" ("MSP"), J. Hoffman, D.O., reported on March 23, 2002, his conclusion that Plaintiff was "a

candidate for contracture release," and indicated that he would "call for authorization." Exhibit F of Complaint. However, Correctional Medical Services ("CMS") denied permission to proceed with surgical intervention. Exhibit H of Complaint. The explanation for denial was, "functional return of hand is not a known result. Surgery would be cosmetic and dangerous." *Id.* On March 26, 2002, Dr. Hoffman appealed the denial on grounds that "the request is for pain relief, not to regain function." *Id.*

This appeal was rejected with the following notation:

> The patient had hand surgery eval on 3/5/02. The dictated note indicates the hazards of this and the probable futility of it. Literature about this disease was given to the MSP. Hand surgery re-eval will accomplish nothing. If there is some other avenue the MSP wishes to pursue, please submit with supporting documents the rationale of the request.

*Id.*

On April 8, 2002, Dr. Hoffman again appealed, stressing that "the request is to have surgery to relieve pain, not correction of the hand." *Id.* The CMS indicated in response to this second appeal that the "case will be presented at MDOC MAC meeting." *Id.*

In a memo dated August 30, 2002, Dr. Pramstaller reported that Plaintiff's "request for Hand Surgery . . . was reviewed by the Medical Services Advisory Committee at its August 28, 2002 meeting." Exhibit 7 of Plaintiff's Brief. Based on this review, the memo continues, "the request was . . . pended for more information." *Id.* Dr. Pramstaller directed the memo's addressees -- a Dr. Urban and Karen Peters, R.N. – to "call Hand Surgeon and see if

he agrees with position that pain is caused by contracture and the best way to control it is by tendon lysis."

*Id.*

Dr. Noellert was contacted on October 2, 2002, and his comments were summarized in progress notes as follows: "Staged approach may be tried to relieve pain. First excision hemangiomas, then lysis adhesion if needed." Exhibit 8 of Plaintiff's Brief.

*Exhaustion*

"No action shall be brought with respect to prison conditions under section 1983 . . ., or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997c(a). Prisoners must therefore "exhaust the prison's grievance procedures before filing suit in federal court." *Wyatt v. Leonard,* 193 F.3d 876, 878 (6th Cir. 1999). This means that the prisoner must pursue all levels of appeal provided in the grievance process. *See Hartsfield v. Vidor,* 199 F.3d 305, 309 (6th Cir. 1999); *White v. McGinnis,* 131 F.3d 593, 595 (6th Cir. 1997) *(per curiam); see generally* MDOC Policy Directive 03.02.130 (allowing for an initial grievance (step one) and two levels of appeal (steps two and three) if the prisoner is not satisfied with the response received). Contrary to what Plaintiff asserts, *see* Plaintiffs Brief at 5, 10, the exhaustion requirement applies not only to § 1983 claims, but also to claims based on the ADA or the Rehabilitation Act. *See Lavista v. Beeler,* 195 F.3d 254, 258 (6th Cir. 1999).

Defendants maintain that Plaintiff never filed a grievance against them with respect to the medical claim.

*See* Defendants' Brief at 4. Plaintiff disputes this contention. *See* Plaintiff's Brief at 5.

The burden is on Plaintiff to demonstrate that he has satisfied the exhaustion requirement. *See Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000) (". . . a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome."). The documentation which he attaches to the complaint does in fact indicate that Plaintiff fully prosecuted a grievance relating to the quality of medical care received for his condition and expressing concern as to when surgical intervention would be authorized. *See* Exhibit A of Complaint.

Defendants do not argue that the foregoing grievance goes to an issue different from the issue Plaintiff is now asserting by way of the medical claim.[2] But they point out

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[2] The grievance states:

> I have requested medical follow-up care, and have not been seen by the doctor, nor have I been treated. I am experiencing a lot of pain from the tumors in my fingers, hand, and arm. My conditions have gotten worst. For example, I am experiencing more pain then ever. I can not open my hand, and the tumors in my fingers, hand, and arm has gotten bigger. I am experiencing nerve pain in my right bicep up my shoulder, and behind my ear and head.

Exhibit A of Complaint.

Plaintiff also refers to an attached "health care kite." *Id.* This is correspondence dated February 6, 2002, and addressed to the "Health Care Director" at the Standish Correctional Facility, where Plaintiff was then incarcerated. *Id.* It states:

(Continued on following page)

that they are not personally identified in the grievance and, citing *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), assert that Plaintiff is therefore "precluded from maintaining an action against them." Defendants' Brief at 5.

The plaintiffs in *Curry* alleged that they had been assaulted by a corrections officer, David Scott, at the Southern Ohio Correctional Facility ("SOCF"). *Curry*, 249 F.3d at 497. Among the defendants named in addition to Scott was Darren Howard, another corrections officer, *id.*, whom the plaintiffs claimed "stood by and did nothing while Scott committed these assaults." *Id.* at 498. The district court dismissed the action against Howard for failure to exhaust, as "none of the prisoners complained about Howard's behavior, nor even mentioned Howard in their prison grievances." *Id.* at 504.

The plaintiffs appealed this dismissal, arguing "that requiring prisoners to put forth all legal theories in their grievances imposes an unduly heightened pleading standard on § 1983 plaintiffs." *Id.* They reasoned that "an investigation into Howard's role in the incident would have flowed naturally from, or been encompassed within, even the most general grievance and, accordingly, nothing

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> On 10-23-01 an evaluation was done . . . concerning my Rehabilitation needs . . . . My "immediate concern" now is has my surgery been approved. I know you cannot tell what date it will take place; however it will allow Dr. Hoffman to upgrade my needs.
>
> Also since my most recent evaluation, changes have occurred, such as painful episodes at times of sleep, and feel now while I can tell and describe my symptoms something can be done while waiting.

*Id.*

beyond the grievances they filed was required to institute administrative proceedings against Howard." *Id.* at 505.

The Sixth Circuit rejected this argument. "The claim against Howard," the court observed, "is a separate claim, against a separate individual, premised on a separate and independent legal theory." *Id.* The purpose underlying the grievance process is "to alert prison officials to problems." *Id.* (citation omitted). "The plaintiffs' grievances may have alerted SOCF to problems with Scott, but they did not reasonably alert SOCF to problems with Howard." *Id.*

Consistent with *Curry*, Plaintiff must satisfy the Court that his grievance clearly and directly implicated each Defendant, even though none of them was mentioned in the grievance. Plaintiff, however, offers no theory as to why prison officials can fairly be said to have been put on notice by his grievance that it was specifically directed at a Defendant.

Nor is it readily apparent that such a connection should have been made by those charged with resolving the grievance. Dr. Hoffman's request for authorization of surgery was not denied by any Defendant. *See* Exhibit H of Complaint. Rather, the request was rejected initially and on appeal by a "R. DeMasi, M.D." *Id.* After a second appeal, it was Dr. Pramstaller who determined that surgery should not be permitted unless and until other measures proved ineffective in relieving Plaintiff's pain. *See supra* p. 6.

In short, there is no sound basis for concluding that the grievance filed by Plaintiff put prison officials on notice that he was faulting any Defendant in connection with the denial of Dr. Hoffman's request. Since the medical claim is predicated on that denial, the Court concludes

that Plaintiff has failed to exhaust his administrative remedies insofar as the medical claim is directed at any Defendants. *See generally Burton v. Jones*, 321 F.3d 569, 574 (6th Cir. 2003) (". . . a prisoner must administratively exhaust his or her claim *as to each defendant associated with the claim*. . . ." (emphasis added)).[3] That claim should therefore be dismissed without prejudice. *See generally, e.g., Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) *(per curiam)* (Dismissal based on failure to exhaust is "without prejudice.").

*Lack of Evidence*

Defendants assert that they "are entitled to dismissal" of the medical claim "based on Plaintiff's failure to state a claim." Defendants' Brief at 7. Thus they implicitly invoke Rule 12(b)(6), which calls for dismissal in the event of "failure to state a claim upon which relief can be granted." F.R.Civ.P. 12(b)(6). In responding to Defendants' motion, however, Plaintiff attached various exhibits in support of his position. The Court will therefore assess this argument in accordance with Rule 56. *See*, F.R.Civ.P. 12(b) (A Rule 12(b)(6) motion "shall be treated as one for summary judgment" if "matters outside the pleadings are presented.").[4]

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[3] Plaintiff notes that Dr. Pramstaller "was identified in the Step III part of the grievance" that he filed. Plaintiffs Brief at 6. *See* Plaintiff's Step III Appeal (unmarked exhibit of Complaint). However, the medical claim is not directed solely at Dr. Pramstaller. *See* Complaint at 21-22 & ¶¶ 4-9 & 39.

[4] Although Defendants' motion is supported by affidavits and documents related thereto, this evidence pertains solely to the accommodation claim.

Dismissal of the medical claim is warranted, Defendants assert, because the "Complaint contains no allegations that . . . Pass, Markwell, Klee or Peterson had any involvement with" the refusal to authorize surgical intervention. Defendants' Brief at 6. With respect to Overton and Jamrog, Defendants assert that there has been "no showing of facts supporting a theory of supervisory liability." *Id.* at 7.

In response to these assertions, it was incumbent upon Plaintiff to identify or submit evidence which could plausibly support a finding of liability. *See generally, e.g., Cardamone v. Cohen,* 241 F.3d 520, 524 (6th Cir. 2001) ("Summary judgment is appropriate after sufficient time for discovery if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case."); *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 102 (6th Cir. 1995) (The party moving for summary judgment "need not support its motion with evidence disproving the nonmoving party's claim, but need only show . . . that there is an absence of evidence to support the nonmoving party's case. . . . The pivotal question is whether the party bearing the burden of proof has presented . . . evidence on which the jury could reasonably find for" that party. (citations & quotation marks omitted)); *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995) ("Essentially, a motion for summary judgment is a means by which to challenge the opposing party to put up or shut up on a critical issue." (citation & quotation marks omitted)). He has not met this burden, as none of Plaintiff's exhibits indicates that any Defendant was personally involved with the decision to deny the surgery request.

Even if not directly and personally involved in the decision to withhold authorization for surgery, a "supervisory official" could still be liable if he or she "at least implicitly authorized, approved, or knowingly acquiesced in" that decision. *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002). As with the issue of personal involvement, however, there is no evidence to support Plaintiff's position on this point. Defendants are therefore entitled to summary judgment.

A grant of summary judgment on grounds of insufficient evidence generally presupposes that there has been "adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also, e.g., Plott v. General Motors Corp.*, 71 F.3d 1190, 1195 (6th Cir. 1995) ("Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case."). Plaintiff complains that he has not yet been provided with this opportunity. *See* Plaintiff's Brief at 3.

If the party opposing summary judgment shows by affidavit that "for reasons stated" he is unable to "present . . . facts essential to justify the . . . opposition," the court "may order a continuance to permit . . . discovery to be had." F.R.Civ.P. 56(f). It "is up to the" non-movant "to state why more discovery is needed." *Wallin v. Norman*, 317 F.3d 558, 564 (6th Cir. 2003). Absent a Rule 56(f) affidavit from the non-movant, "there is no justification for the district court's blanket statement that a motion for summary judgment will be premature until the close of discovery." *Id.* Thus Plaintiff must satisfy the Court that his inability to conduct discovery would be prejudicial.

Plaintiff does not make a persuasive case for delaying a decision on Defendants' motion. A party is required by Rule 56(f) to demonstrate "how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact." *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989) (citation omitted). This of course means that the party must identify "what material facts" it expects to "uncover" through discovery. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 489 (6th Cir. 2000) (citation & quotation marks omitted). Moreover, the factual basis for this expectation must be articulated and reasonably compelling. *Cf. Emmons*, 874 F.2d at 357-58 (In this case, the court faulted the Rule 56(f) affidavit for failing to state "facts that, if they existed, should have been within Appellant's personal knowledge." The court further observed that "mere speculation as to the usefulness" of an "informant's testimony" was "insufficient to justify disclosure of his identity."); *see also, e.g., Duffy v. Wolle*, 123 F.3d 1026, 1041 (8th Cir. 1997) (". . . Rule 56(f) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation." (citation & quotation marks omitted)).

Plaintiff simply expresses a general need for discovery: He does not specify what facts he believes discovery would reveal, why he harbors that belief, and how the facts would warrant denial of Defendant's motion. Plaintiff's professed need to engage in discovery therefore amounts to the kind of "blanket statement" which *Wallin* disapproved. *See also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1395 (5th Cir. 1994) ("The nonmoving party may not simply rely on vague assertions that additional discovery

will produce needed, but unspecified facts." (citation & quotation marks omitted)).

For these reasons, summary judgment should enter in favor of Defendants notwithstanding the lack of discovery.

*Qualified Immunity*

"In civil suits pursuant to 42 U.S.C. § 1983 for money damages, qualified immunity protects a public official from being sued as long as the official does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Crockett v. Cumberland College*, 316 F.3d 571, 579 (6th Cir. 2003) (citation and quotation marks omitted). Defendants argues that they enjoy such protection vis-á-vis Plaintiff's Medical Claim. Defendants' Brief at 7-8.

Prior to "addressing the substance of a claim of qualified immunity, the court must first determine whether the plaintiff has stated a claim of a constitutional violation at all." *Skousen v. Brighton High School*, 305 F.3d 520, 527 (6th Cir. 2002). *See also Crockett*, 316 F.3d at 579 (An inquiry into whether a constitutional "right was clearly established" is necessary only if it is demonstrated that the right was in fact violated.). Thus before dealing specifically with the matter of qualified immunity, the Court will consider the merit of Plaintiff's assertion that Defendants' conduct was in violation of the Eighth or Fourteenth Amendment.

The Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. It "requires the State to provide adequate medical care to incarcerated prisoners." *DeShaney v. Winnebago County Dep't of Soc. Servs.*,

489 U.S. 189, 198 (1989). "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "Deliberate indifference" requires a showing that "the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

There is no sound medical evidence that Plaintiff was subjected to a significant risk of serious harm by the withholding of authorization for surgery. Indeed, the evidence points to the opposite conclusion. While Dr. Hoffman was emphatic on the point that the surgery was for pain relief, *see* Exhibit H of Complaint, Dr. Noellert – the specialist whose recommendation Dr. Hoffman was acting upon – is much more equivocal on the point. Dr. Noellert's report reflects substantial doubt on his part as to whether surgery was advisable, and he indicates that the primary objective would be to improve appearance. *See supra* p. 4. Most important of all, the evidence clearly indicates that Dr. Noellert and prison medical authorities were in agreement that, apart from the potential cosmetic benefits, the need for the requested surgery could be obviated through less drastic measures designed to alleviate Plaintiff's pain. *See supra* p. 6; *see also* Specialty Consult Report (unmarked exhibit of Plaintiff's Brief) (wherein Dr. Hoffman indicates that the surgery is not "urgent"). The record therefore does not reasonably support the inference that prison officials acted with deliberate indifference.

Plaintiff fares no better under the Fourteenth Amendment, which requires "equal protection of the laws." U.S.

Const. Amend. XIV, § 1. There is no violation of the Equal Protection Clause absent a showing that prison officials discriminated against Plaintiff on the basis of his disability. *See Copeland v. Machulis*, 57 F.3d 476, 480 (6th Cir. 1995) *(per curiam)* ("In order to establish a violation or the Equal Protection Clause, an inmate must prove that a racially discriminatory intent or purpose was a factor in the decision of the prison officials."); *cf. Hansen v. Rimel*, 104 F.3d 189, 190 (8th Cir. 1997) (stating that the warden/defendant "could only have violated" a hearing-impaired inmate's "right to equal protection if he treated" the inmate "dissimilarly than similarly situated inmates"). Plaintiff submitted no evidence which suggests that the refusal to authorize surgery was discriminatory.

The Court therefore concludes that the denial of authorization for surgery violated neither the Eighth nor Fourteenth Amendment. A necessary corollary of this conclusion, of course, is that the denial violated no right which was "clearly established." *See generally Crockett*, 316 F.3d at 579 (The right in question must be "so clearly established that a reasonable official would understand that the particular conduct at issue violated that right.").

"The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity." *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1095 (6th Cir. 1992). Plaintiff cited no judicial decision which supports his contention that the refusal to authorize surgery violated his constitutional rights – let alone a binding decision predating the alleged violation. *See generally Sheets v. Moore*, 97 F.3d 164, 166 (6th Cir. 1996) ("In determining whether a constitutional right is clearly established, a district court must find binding precedent by the Supreme Court, its court of appeals, or

itself." The "unlawfulness must be apparent" under "pre-existing law." (citation and quotation marks omitted)). Thus even if this refusal were unconstitutional, Plaintiff is barred from obtaining monetary relief pursuant to the doctrine of qualified immunity.

## II. Accommodation Claim

"Whenever a prisoner is identified as having a medical condition which restricts his . . . ability to function adequately in the institutional environment, a qualified health professional shall identify reasonable options available . . . which will meet the prisoner's special medical need." Policy Directive 04.06.160. Plaintiff alleges that in keeping with this policy, he was moved into a "handicap (single) cell." Complaint at ¶ 43. This accommodation, according to Plaintiff, was authorized by an Assistant Resident Unit Supervisor identified as "M. Risley." *Id.* Plaintiff was not permitted to remain in a single cell, however, and prison officials have denied his request for single-cell accommodation. *See id.* at ¶¶ 40-45, 49; Affidavit of Paul Klee at ¶ 3.

### *Total Exhaustion*

Defendants ask the Court to invoke the "'total exhaustion' rule," Defendants' Brief at 5, which holds that "a prisoner civil rights action" having "both exhausted and unexhausted claims" must "be dismissed in its entirety . . . , rather than simply dismissing . . . the unexhausted claims." *Jenkins v. Toombs*, 32 F.Supp.2d 955, 957 (W.D. Mich. 1999). According to Defendants, "the majority of courts that have addressed the issue have applied" this rule. Defendants' Brief at 5.

As Defendants suggests, there is a split in authority on the question of whether § 1997e(a) mandates dismissal of all claims if at least one has not been exhausted. *See Rivera v. Whitman*, 161 F.Supp.2d 337, 339-40 (D. N.J. 2001), *overruled on other grounds by Ray v. Kertes*, 285 F.3d 287 (3d Cir. 2002) (collecting cases). On two occasions, the Sixth Circuit has acknowledged the issue, without deciding it. *See Burton*, 321 F.3d at 577 ("Because we have concluded that [the] district court erred when it determined that Burton had not administratively exhausted his First Amendment retaliation claim against the defendants, we do not need to reach the question of whether the district court erred when it dismissed Burton's entire lawsuit because Burton failed to exhaust the available administrative remedies with respect to one of his claims.")[5]; *Knuckles El*, 215 F.3d at 642 ("We reserve to

[5] Although *Burton* explicitly declined to decide the issue, the court all but rejected the total-exhaustion rule in *dictum*. *See Burton*, 321 F.3d at 575 n.2 (The "holding" in *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999), "illustrates that a prisoner's lawsuit, which alleges multiple claims against multiple defendants, is not vulnerable to dismissal under § 1997e(a) simply because the prisoner has failed to exhaust a particular claim as to a specific defendant."). *See also Riley v. Richards*, No. 99-1327, 2000 WL 332013, at *2 (6th Cir. Mar. 23, 2000) (*per curium*) (likewise citing *Hartsfield* in declaring that "the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted").

*Hartsfield* affirmed the district court's rejection on the merits of some of the prisoner/plaintiff's claims, and remanded for dismissal of other claims for failure to exhaust. *See Hartsfield*, 199 F.3d at 309-10. But the court did not explicitly address the question of whether exhausted claims must be dismissed along with those that are unexhausted. *Burton* and *Riley* therefore attach undue significance to the case. *See Rose v. Lundy*, 455 U.S. 509, 514 n.5 (1982) ("In *Gooding v. Wilson*, 405 U.S. 518 (1972), this Court reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his

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another day the question of whether exhausted claims in a 'mixed' complaint should be addressed . . . or whether such a complaint should be dismissed in its entirety.").

The starting point for resolving this issue is of course § 1997e(a) itself. As noted earlier, that statute prohibits the commencement of an "*action* . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The highlighted term indicates that a court may dismiss *all* claims if at least one has not been exhausted. *See* Black's Law Dictionary (7th ed. 1999) (defining an "action" as a "civil or criminal judicial proceeding"); F.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court."); *Hudson v. Reno*, 130 F.3d 1193, 1199-1200 (6th Cir. 1997), *overruled on other grounds by Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (finding that the "plain" meaning of the term "action," used in 42 U.S.C. § 1981a, is a lawsuit, as distinguished from particular "claims" asserted in a lawsuit); *Rivera*, 161 F. Supp.2d at 341 ("The plain meaning of 'action' " is "patently distinct from 'claim.' ").

This inference is reinforced by another provision in the same statute. Section 1997e(c)(2) authorizes dismissal

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habeas petition. *Gooding* does not control the present case, however, since the question of total exhaustion was not before the Court."); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000) (a post-*Hartsfield* case in which the Sixth Circuit implicitly assumed that it has not yet decided whether all claims must be exhausted to avoid dismissal pursuant to § 1997e(a)); *Smeltzer v. Hook*, 235 F.Supp.2d 736, 742 (W.D. Mich. 2002) (The "issue of total exhaustion was not before the Court" in *Hartsfield.); Rivera v. Whitman*, 161 F.Supp.2d 337, 340 n.1 (D. N.J. 2001) (observing that in *Hartsfield*, "the 'total exhaustion' issue . . . was not squarely presented nor considered by the court," and that the "issue was not among those on appeal").

of a frivolous "*claim* without first requiring the exhaustion of administrative remedies." 42 U.S.C. § 1997e(c)(2) (emphasis added). The choice of the word "claim" in this provision logically suggests that "action," as used in subparagraph (a) of § 1997e, refers to the entire lawsuit. *See Rivera*, 161 F. Supp.2d at 341 ("Congress's use of the different terms indicates that it intended different meanings.").

Also noteworthy is the fact that the phrase "civil action with regard to prison conditions," which is nearly identical to the formulation in § 1997e(a), is defined as "any *civil proceeding* . . . with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (emphasis added). This definition implicitly equates a "civil proceeding" with an "action," and thus counsels against a narrow construction of the latter term. *See Rivera*, 161 F. Supp.2d at 340-41.

But while it is fairly clear that §1997e(a) *authorizes* total dismissal, it does not necessarily follow that the statute *requires* it. As noted by Judge Enslen, "a court can prevent a plaintiff from bringing an action before his administrative remedies are exhausted in two ways: by dismissing the complaint altogether or by limiting the complaint to exhausted claims." *Jenkins*, 32 F.Supp.2d at 957. Thus even a partial dismissal is compatible with the language of § 1997e(a). *Cf. Rose v. Lundy*, 455 U.S. 509, 516-518 (1982) (determining that 28 U.S.C. § 2254 is inconclusive on the question of whether a court could review a "mixed" habeas petition – *i.e.* a petition raising

exhausted and unexhausted claims).[6] *But see, e.g., Rivera*, 161 F.Supp.2d at 341 (The statute's "plain language compels a 'total exhaustion' rule.").

Although conceding that the relevant statutory language did not compel its conclusion, *Rose* held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522 (footnote omitted). *Rose* justified its holding on the ground that the total-exhaustion rule would promote comity between federal and state courts. *See id.* at 515-19.[7]

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[6] The statute at issue in *Rose* provided that an "application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (*quoted in Rose*, 455 U.S. at 516 n.9). Thus it is roughly analogous to 42 U.S.C. § 1997e(a). *See Jenkins*, 32 F.Supp.2d at 957 (noting that the Court in *Rose* "found that . . . language" which was "similar" to § 1997e(a) "did not, in and of itself, impose a total exhaustion requirement").

[7] Subsequent to *Rose*, the habeas statute was amended to provide that an "application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). This amendment, however, does not authorize courts to reject specific claims upon which a habeas petition is based. *See Rockwell v. Yukins*, 217 F.3d 421, 424 (6th Cir. 2000) (Section 2254(b) makes "clear that the only circumstance under which mixed petitions may be considered by a district court is where the court determines that the petition must be denied in its entirety."); *see also Martin v. Jones*, 969 F.Supp. 1058, 1063 (M.D. Tenn. 1997) ("The language of § 2254(b)(2) . . . suggests that the courts only have discretion to deny an entire 'mixed' application on the merits, but cannot deny a particular claim."). Thus *Rose*'s total-exhaustion rule was "altered" only "slightly" by § 2254(b)(2). *Rockwell*, 217 F.3d at 424. *See Martin*, 969 F.Supp. at 1063 ("If a court does not elect to deny the whole application, then presumably it must adhere to the total exhaustion rule and dismiss the petition in its entirety.").

Section 1997e(a), calls for deference to prison grievance procedures, rather than to state judicial proceedings as in the habeas statute. However, both § 1997e(a)'s exhaustion requirement and that of the habeas statute are designed to ensure that the prisoner pursue other available avenues before seeking relief from the federal courts. *Compare Rose*, 455 U.S. at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. . . . Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.") *with Wyatt*, 193 F.3d at 878-79 (Section 1997e(a) "insure[s] that prisons . . . are given the opportunity to respond to prisoner complaints . . . , so that . . . injuries are prevented in the future. . . . Courts will conserve time and effort as a result of any factfinding during the administrative process. . . . (citation & quotation marks omitted)). *Rose*'s premise – that this design is better served by adherence to the total-exhaustion rule – therefore applies with equal force to § 1997e(a). *See, e.g., Smeltzer v. Hook*, 235 F.Supp.2d 736, 745 (W.D. Mich. 2002); *Rivera*, 161 F.Supp.2d at 342-32. *But see, e.g., Jenkins*, 32 F.Supp.2d at 959.

In short, there is a basis to apply the reasoning of *Rose*'s habeas exhaustion to prisoner cases brought under § 1983. *Cf. Brown*, 139 F.3d at 1103 (Section 1997e(a) "recognizes that it is difficult to explain why we require full exhaustion of state remedies in habeas corpus cases involving life and liberty, but allow direct access in prison rights cases under § 1983."). Consistent with that decision, the Court concludes that § 1997e(a) requires dismissal of

both exhausted and unexhausted claims. *See Wyatt*, 193 F.3d at 879 (Under § 1997e(a), "it is now incumbent upon the district court to assure that the exhaustion requirement has been substantially met before proceeding to the merits of *any* prisoner claims. If the exhaustion requirement has not been substantially met, the federal *case* should be dismissed. . . . " (emphasis added)); *Mack v. Dewitt*, 40 Fed.Appx. 36, 38 (6th Cir. 2002) (*per curiam*) ("When a prisoner . . . only partially exhausts administrative remedies, dismissal of the complaint is appropriate.").

An exception to the total-exhaustion rule is recognized in habeas cases presenting "unusual or exceptional circumstances." *Rockwell v. Yukins*, 217 F.3d 421, 423 (6th Cir. 2000). *Compare Wyatt*, 193 F.3d at 879 (Section 1997e(a) may be subject to "certain limited exceptions."). But even if this exception extends to § 1983 cases, there is no apparent basis for applying it in this case. *Compare Rose*, 455 U.S. at 515-16 (observing that the common-law "exhaustion doctrine" made exceptions "only in rare cases where . . . circumstances of peculiar urgency are shown to exist" (citation, quotation marks & footnote omitted)); *Sitto v. Bock*, 207 F.Supp.2d 668, 676-77 (E.D. Mich 2002) (The "outright dismissal" of a habeas petition for failure to exhaust is inappropriate if the prisoner would be time-barred from re-filing the petition following exhaustion.); *see generally Wyatt*, 193 F.3d at 879 (Any "exceptions" to § 1997e(a) which "may arise . . . will be rare."). Nor have Defendants argued for application of a statutory exception to § 1997e(a), which permits courts to disregard the exhaustion requirement in "the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C.

§ 1997e(c)(2). The total-exhaustion rule should therefore be invoked, and Plaintiff's accommodation claim should accordingly be dismissed along with the medical claim.[8]

Although this dismissal is without prejudice, the more appropriate source of authority is F.R.Civ.P. 56, rather than F.R.Civ.P. 12. *See Hite v. Kimmerly*, 22 Fed.Appx. 531, 531-32 (6th Cir. 2001) (affirming the district court's grant of summary judgment based on failure to comply with 42 U.S.C. § 1997e(a)); *cf. Ravencraft v. UNUM Life Ins. Co. of America*, 212 F.3d 341, 344 (6th Cir. 2000) (affirming the district court's grant of summary judgment in a disability-benefits case based on failure to exhaust administrative remedies, as required by ERISA, but vacating and remanding with instructions to "dismiss the asserted cause of action without prejudice"). *But see Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.), *petition for cert. filed*, 71 U.S.L.W. 3668 (U.S. Apr. 1, 2003) (No. 02-1486) (" . . . the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment."); *Mardirossian v. Paul Revere Life Ins. Co.*, 286 F.3d 733, 735 (4th Cir. 2002) (A ruling that the plaintiff failed to exhaust administrative remedies is not on the merits, and therefore summary judgment is inappropriate. Dismissal should instead be "for lack of subject matter jurisdiction."). In keeping with the logic of the total-exhaustion rule, the

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[8] Even if the total-exhaustion rule is not applied, the accommodation claim should be dismissed as against Overton. Plaintiff has produced no evidence to rebut Defendants' assertion that he failed to identify Overton in his accommodation-related grievances. *See* Defendants' Brief at 14.

dismissal should extend to claims asserted against Dr. Pramstaller, regardless of whether those claims were exhausted. *See Burton*, 321 F.3d at 574 (quoted *supra* p. 9).

*No Discrimination*

To establish that Defendants violated the ADA, the Rehabilitation Act, or the Equal Protection Clause of the Fourteenth Amendment, Plaintiff must demonstrate that the refusal to provide a single cell was motivated by discrimination against him because of his impairment. *See* 42 U.S.C. § 12132 (" . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); 29 U.S.C. §794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . "); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) (The Equal Protection Clause is violated by "arbitrary and irrational discrimination."). Along with their motion, Defendants submitted the following evidence:

(1) Plaintiff was provided with a prisoner assistant to help him with daily activities. *See* Affidavit of Mary Jo Pass at ¶ 3; Affidavit of Chad Markwell at ¶ 4.

(2) Plaintiff was allowed additional time for washing up than is ordinarily accorded to prisoners. Pass Affidavit at ¶ 3.

(3) Plaintiff was assigned a lower bunk. Markwell Affidavit at ¶ 4.

(4) Plaintiff was removed from the handicap cell when it was determined that he did not have appropriate authorization for placement in such a cell, and to make room for an incoming wheelchair-bound prisoner. *See id.* at ¶ 3; Klee Affidavit at ¶ 3; Affidavit of Bonnie Peterson at ¶ 3.[9]

These affidavits indicate that an effort was made to accommodate Plaintiff's impairment – an effort which Plaintiff does not dispute. This tends to undermine the proposition that Defendants were biased against Plaintiff on account of his impairment. Nor does Plaintiff supply compelling evidence of such a bias. Defendants are therefore entitled to summary judgment with respect to this issue.

*Eighth Amendment*

The Supreme Court has specifically rejected the argument that double-celling is a cruel and unusual punishment. *See Rhodes v. Chapman*, 452 U.S. 337, 347-50 (1981). Plaintiff indicates that this arrangement renders him particularly vulnerable to injury. *See* Plaintiff's Brief at 10, 13, 16. But there is nothing more than scant anecdotal evidence – in the form of Plaintiff's sworn complaint – to support the conclusion that Plaintiff would

[9] Plaintiff acknowledges that a wheelchair-bound inmate was moved into the single cell formerly occupied by Plaintiff. *See* Affidavit of Timothy Williams-El at ¶ 7. The Court rejects as frivolous Plaintiff's suggestion that an alleged delay of "4 to 5 weeks" before this move was made contradicts the assertion that he was relocated in order to make room for the incoming handicapped prisoner. *Id.*

be significantly safer in a single cell. *See* Complaint at ¶ 49 (alleging that in October of 2002, he was "injured" and "developed new tumors" when his "cell-mate accidentally slammed into" his "entire arm and hand"). And even this meager evidence is undermined by the fact that, shortly before his allegedly harmful collision with a cell-mate, Plaintiff explained that he needed a single cell to provide "additional space" to "rest" his arm. Health Care Request (dated September 11, 2002; unmarked exhibit of Plaintiff's Brief). *Compare* Plaintiff's Brief at 17 (indicating that he needs a single cell "for mobility and to cure and ease any future hardship").

A jury could not reasonably infer from this record that double-celling is so risky to Plaintiff's well-being that it constitutes a violation of the Eighth Amendment. Summary judgment should therefore enter as to this issue.

*Qualified Immunity*

For reasons explained, the Court agrees with Defendant that Plaintiff has not established a constitutional or statutory violation in connection with the accommodation claim. As with the medical claim, then, Defendants are therefore also correct in asserting that Plaintiff is barred by the doctrine of qualified immunity from recovering monetary damages for the alleged failure to accommodate. *See supra* p. 15.

**Conclusion**

Defendants' motion for dismissal/summary judgment (D/E 27) should be granted. Pursuant to 42 U.S.C. § 1997e(a) and F.R.Civ.P. 56(c), the complaint should be dismissed without prejudice. Alternatively, summary

judgment in favor of Defendants should enter on the merits. The latter disposition would not fully resolve this case, as Plaintiff's claims against Dr. Pramstaller would remain to be adjudicated.[10]

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

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[10] Plaintiff is proceeding *in forma pauperis*, and the United States Marshal was ordered to effect service. *See* D/E 4; F.R.Civ.P. 4(c)(2). The request for waiver of service on Dr. Pramstaller was returned unsigned with a cover letter from Susan Coley, Administrative Assistant for the MDOC's Bureau of Health Care Services. *See* D/E 11. In this letter, which is dated January 15, 2003, Coley explained that Dr. Pramstaller was "currently out of the office," and would be returning on January 27, 2003. *Id.* However, the Marshal apparently made no further effort to serve Dr. Pramstaller. Thus if the recommendation to dismiss the complaint is not accepted, the Court will enter an order directing the Marshal to again attempt service on Dr. Pramstaller. *See*, F.R.Civ.P. 4(m); *Byrd v. Stone*, 94 F.3d 217, 219-20 (6th Cir. 1996).

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

/s/ Virginia Morgan
VIRGINIA M. MORGAN
UNITED STATES
MAGISTRATE JUDGE

Dated: Jul. 22, 2003

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

TIMOTHY WILLIAMS-EL,

Plaintiff,

v.

Case No. 02-CV-75133-DT

WILLIAM OVERTON, DAVID JAMROG, MARY JO PASS, PAUL KLEE, CHAD MARKWELL, DR. GEORGE PRAMSTALLER, and BONNIE PETERSON,

Honorable Denise Page Hood

Defendants.

_____/

**ORDER ACCEPTING REPORT AND RECOMMENDATION**

(Filed Oct. 31, 2003)

This matter is before the Court on Magistrate Judge Virginia M. Morgan's Report and Recommendation dated July 22, 2003. The Court extended Plaintiff's time to file his Objections to the Report and Recommendation. Plaintiff filed his Objections on September 25, 2003.

The Court has had an opportunity to review the Report and Recommendation and finds that the Magistrate Judge reached the correct conclusion for the proper reasons. The Court agrees with the Magistrate Judge that the Complaint should be dismissed pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies. See *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). The Court, therefore, will not address the merits of the

Complaint and the Court takes no position with regards to the Magistrate Judge's analysis on the merits of the Complaint.

Accordingly,

IT IS ORDERED that Magistrate Judge Morgan's Report and Recommendation dated July 22, 2003 is ACCEPTED and ADOPTED as this Court's findings of fact and conclusions of law as to the failure to exhaust administrative exhaustion issue only.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or for Summary Judgment (Docket Nos. 27-1 and 27-2, filed April 15, 2003) is GRANTED with regards to the failure to exhaust administrative remedies issue only.

IT IS FURTHER ORDERED that the Complaint is DISMISSED without prejudice.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: OCT 31 2003

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

TIMOTHY WILLIAMS-EL,

Plaintiff,

v. Case No. 02-CV-75133-DT

WILLIAM OVERTON, DAVID JAMROG, MARY JO PASS, PAUL KLEE, CHAD MARKWELL, DR. GEORGE PRAMSTALLER, and BONNIE PETERSON, Honorable Denise Page Hood

Defendants.
_____/

**JUDGMENT**

(Filed Oct. 31, 2003)

This action having come before the Court and the Court having entered an Order dismissing the Complaint,

Accordingly,

Judgment is entered in favor of Defendants and against Plaintiff.

DAVID J. WEAVER
CLERK OF COURT

By: /s/ P.R. Sausberry
Deputy Clerk

Approved:

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: OCT 31 2003
Detroit, Michigan

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
**Filed Name: 05a0534n.06**
**Filed: June 22, 2005**

**No. 03-2507**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

| | |
|---|---|
| **TIMOTHY WILLIAMS,** | ) |
| **Plaintiff-Appellant,** | ) |
| **v.** | ) **ON APPEAL FROM** |
| **WILLIAM OVERTON, DAVID JAMROG, MARY JO PASS, PAUL KLEE, CHAD MARKWELL, GEORGE PRAMSTALLER, and BONNIE PETERSON,** | ) **THE UNITED STATES** ) **DISTRICT COURT** ) **FOR THE EASTERN** ) **DISTRICT OF MICHIGAN** |
| **Defendants-Appellees.** | ) |

**Before: GIBBONS and SUTTON, Circuit Judges, and EDGAR, District Judge.***

**JULIA SMITH GIBBONS, Circuit Judge.** Plaintiff-Appellant Timothy Williams, an inmate in a Michigan Department of Corrections (MDOC) facility, filed a *pro se* § 1983 action against several employees of the MDOC. The district court dismissed Williams' case without prejudice based on a finding that Williams had failed to exhaust all

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* The Honorable Robert Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

of his administrative remedies as required by 42 U.S.C. § 1997e(a). Williams appeals that determination.

For the following reasons, we affirm the judgment of the district court.

## I.

Williams is an inmate in the custody of the MDOC. Appellant has had "noninvoluting cavernous hemangiomas" in his right arm since birth. This condition creates the growth of tumors and results in disfigurement of his arm.

*Denial of Surgery Claim*

In March 2001, Williams submitted to surgery performed by Khawaja H. Ikram, D.O., to remove a hemangioma, primarily to relieve the pain accompanying his condition. Williams went to K. Nimr Ikram, D.O. in August 2001 and January 2002 for consultations. At both consultations, further surgery to remove hemangiomas and to straighten his wrist was discussed. On Dr. Ikram's referral, Williams went to see Raymond C. Noellert, M.D. in March 2002. Dr. Noellert concluded that surgery would be "a fairly extensive undertaking" and even in the best case scenario, he "would not expect much in the way of digital flexion over strength, with the hand largely functioning as a passive assist." Dr. Noellert discussed this opinion with Williams, and authorized the treatment because Williams "simply cannot stand the hand the way it is."

The Correctional Medical Services ("CMS") denied authorization of the surgery, stating that "functional

return of hand is not a known result. Surgery would be cosmetic and dangerous." On March 26, 2002, this result was appealed on the grounds that the "request is for pain relief not to regain function." The request was again denied, due to the "hazards" of the surgery and the "probable futility of it." The result was again appealed on April 8, 2002 and the CMS decided to present the case at an upcoming medical meeting.

Williams completed a Prisoner/Parolee Grievance Form on June 17, 2002, complaining that he had requested medical follow-up care and had not been treated. Williams failed to specifically name any of the appellees in the Grievance. The Medical Services Advisory Committee upheld the non-approval. Williams appealed this decision through Steps II and III of the grievance process, but both appeals were denied.

*Single-Occupancy Cell Accommodation Claim*

On August 13, 2002, Williams requested, among other accommodations, placement in a "handicapped accessible single cell" to accommodate his condition. On August 22, 2002, he filed a Prisoner/Parolee Grievance Form against Warden Jamrog requesting the same accommodation. This request was denied. Williams appealed the denial of placement in a single cell through Steps II and III of the grievance process, but his appeals were denied because he was not eligible under prison regulations for placement in a single occupancy cell. Apparently, at some point Williams was placed in a single occupancy cell, but was later removed from the cell because Williams failed to provide medical documentation or other evidence that he qualified for single cell occupancy. After his removal, Williams filed

a Grievance Form against Deputy Warden of Housing Klee and Supervisor Peterson. Williams unsuccessfully appealed the denial of these grievances through Steps II and III of the process.

*District Court Opinion*

Williams filed a *pro se* § 1983 action against various members of the MDOC – Appellees Jamrog, Klee, Markwell, Pass, Peterson and Overton – claiming that (1) he was denied the surgical procedure to remove the tumors in his hand, and (2) he was improperly denied placement in a single occupancy cell. Williams claimed a violation of the Americans with Disabilities Act, the Rehabilitation Act, and the Eighth and Fourteenth Amendments, seeking injunctive and monetary relief. In lieu of filing an answer, defendants-appellees Jamrog, Markwell, Pass, Klee, Peterson and Overton filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) and a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b). United States Magistrate Judge Virginia M. Morgan reviewed the case and issued a Report and Recommendation which recommended that the defendants' motions be granted. The magistrate judge reached the following conclusions: (1) the motion to dismiss should be granted because Williams failed to name any of the defendants specifically in his grievances filed regarding his medical claim, and thus had failed to exhaust his administrative remedies; (2) defendants were entitled to summary judgment due to the fact that Williams failed to present evidence to support his claim with regard to the medical procedure; (3) the defendants were entitled to qualified immunity on Williams' medical claim; (4) defendants should be granted summary judgment on Williams'

accommodation claim due to the "total exhaustion" rule based on Williams' failure to exhaust his medical claim; (5) Williams failed to survive the summary judgment standard with respect to his accommodation claim pursuant to the ADA, the Rehabilitation Act, the Eighth or the Fourteenth Amendments; and (6) defendants were entitled to qualified immunity on Williams' accommodation claim.

The district court reviewed the Magistrate Judge's Report and Recommendation and dismissed the complaint for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). The district court explicitly failed to address the remainder of the Magistrate Judge's analysis. Williams filed a timely appeal from the district court's order.

## II.

This court reviews *de novo* a district court's dismissal for failure to exhaust administrative remedies. *Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997).

The district court held that Williams had failed to exhaust his administrative remedies because although he had filed a grievance and pursued the appropriate appeals with regard to the denial of his request for surgery, he failed to identify any of the defendants personally, and thus had failed to exhaust his claim with respect to those individuals as required by *Curry*, 249 F.3d at 504-05. Applying the total exhaustion rule, the district court dismissed Williams' complaint in its entirety, despite the fact that he appears to have exhausted his administrative remedies with respect to the single-occupancy cell accommodation claim.

The Prison Litigation Reform Act requires prisoners who wish to file a civil rights action regarding the conditions of their confinement to exhaust all available administrative remedies prior to filing suit in federal court. 42 U.S.C. § 1997e(a); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). The prisoner bears the burden of showing that all administrative remedies have been exhausted by attaching any decision demonstrating the "administrative disposition of his complaint." *Brown*, 139 F.3d at 1104. The prisoner must demonstrate that he has exhausted the administrative remedies with respect to each individual he intends to sue. *Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003); *Burton v. Jones*, 321 F.3d 569, 574 (6th Cir. 2003).

The exact statutory language of 42 U.S.C. § 1997e(a) states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Until fairly recently, there had been a lack of clear consensus on whether the language of 42 U.S.C. § 1997e(a) compels total exhaustion. Recently, however, this court "definitively answer[ed]" the question of whether a prisoner's complaint containing both exhausted and unexhausted claims must be dismissed under the PLRA in the affirmative. *See Jones Bey v. Johnson*, 407 F.3d 801, 805 (6th Cir. 2005). Pursuant to this circuit's opinion in *Jones Bey*, it is now clear that total exhaustion is required in order for a prisoner to bring a civil rights action in this court. *Id.* at 809.

Williams has failed to satisfy the requirement of total exhaustion under the PLRA, and thus, the district court's judgment must be affirmed. Williams did file a grievance based on the denial of medical treatment, and he appealed the grievance through Steps II and III of the grievance process, thus pursuing the claim through all stages of the process. However, the grievance failed to specifically name any of the appellees that Williams has named in his complaint. Because Williams has failed to exhaust his claims with respect to individual appellees, his complaint must be dismissed under the PLRA. *See Burton*, 321 F.3d at 574 ("[A] prisoner must administratively exhaust his or her claim as to each defendant associated with the claim.").

With respect to Williams' accommodation claim, Williams filed a grievance against specific individuals and appealed the grievance through Steps II and III of the process. Thus, it appears that Williams exhausted his administrative remedies on the accommodation claim, a conclusion not contested by the defendants-appellees. Despite Williams' apparent exhaustion of this issue, however, *Jones Bey* requires that the entire action be dismissed due to Williams' failure to exhaust his medical claims. *See Jones Bey*, 407 F.3d at 807.

## III.

For the foregoing reasons, we affirm the judgment of the district court.

**United States District Court**
**Western District of Michigan (Marquette)**
**CIVIL DOCKET FOR**
**CASE #: 2:02-cv-00117-GJQ-TPG**

Walton #173849 v. Bouchard et al

| Date Filed | # | Docket Text |
|---|---|---|
| 08/12/2002 | 1 | COMPLAINT with Magistrate Referral against all defendants; filed by pro se John H. Walton #173849 (Attachments:, # 1 Attachment Affidavit, # 2 Financial Documents (ifp)) (slk, ) (Entered: 08/14/2002) |
| 08/12/2002 | 2 | MOTION to Dismiss *Defendant Ron Bobo* by pro se John H. Walton #173849 (slk, ) (Entered: 08/14/2002) |
| | | * * * |
| 10/15/2002 | 7 | ORDER REGARDING PARTIAL SERVICE: dismissing defendant Bobo; the Clerk is to arrange for service of this order and the complaint; signed by Judge Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 10/15/2002) |
| | | * * * |
| 11/18/2002 | 20 | MOTION to Amend/Correct 1 by pro se John H. Walton #173849 (slk, ) (Entered: 11/18/2002) |
| | | * * * |
| 12/05/2002 | 27 | ORDER granting 20 Motion to Amend/Correct; signed by Judge Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 12/05/2002) |
| | | * * * |

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|---|---|---|
| 12/12/2002 | 29 | SUPPLEMENT re 1 by pro se John H. Walton #173849 (slk, ) (Entered: 12/16/2002) |
| 12/12/2002 | 30 | SUPPLEMENT re 1 by pro se John H. Walton #173849 (slk, ) (Entered: 12/16/2002) |

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|---|---|---|
| 01/13/2003 | 32 | MOTION to Dismiss by Catherine Bauman, D. Bergh, Barbara Bouchard, Denise Gerth (erv, ) (Entered: 01/13/2003) |
| 01/13/2003 | 33 | BRIEF in Support of 32 filed by Catherine Bauman, D. Bergh, Barbara Bouchard, Denise Gerth (Attachments:, # 1 Attachment, # 2 Exhibit A) (erv, ) (Entered: 01/13/2003) |

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| 01/21/2003 | 36 | MOTION for Summary Judgment by pro se John H. Walton #173849 (Attachments:, # 1 Attachment) (slk, ) (Entered: 01/21/2003) |

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|---|---|---|
| 02/14/2003 | 40 | MOTION for order *to Adopt by Reference the Motion and Brief filed on or about January 7, 2003* by defendant Ken Gearin ; (slk, ) (Entered: 02/14/2003) |
| 02/14/2003 | 41 | BRIEF in support of 40 filed by Ken Gearin (slk, ) (Entered: 02/14/2003) |

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| 02/28/2003 | 44 | ORDER granting 40 motion to adopt; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 02/28/2003) |

* * *

02/28/2003 45 MOTION for summary judgment by plaintiff John H. Walton #173849 (Named as Plaintiff Motion for Summary Judgment and Opposit to Defendants Motion for Summary Judgment); responses due 3/28/2003; (Attachments: # 1 Order Rejecting Pleading) (slk, ). (Entered: 02/28/2003)

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03/07/2003 47 RESPONSE in opposition re 32 filed by John H. Walton #173849 (Attachments: # 1 Attachment letter) (slk, ) (Entered: 03/10/2003)

* * *

04/21/2003 53 AFFIDAVIT in support re 52 filed by John H. Walton #173849 (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit IA# 11 Exhibit J# 12 Exhibit K# 13 Exhibit L# 14 Exhibit M# 15 Exhibit N# 16 Exhibit O# 17 Exhibit P# 18 Exhibit PA# 19 Exhibit Q# 20 Exhibit R# 21 Exhibit S# 22 Exhibit T# 23 Exhibit W# 24 Exhibit X# 25 Exhibit Y# 26 Exhibit YA# 27 Exhibit Z# 28 Exhibit 1# 29 Exhibit 1A# 30 Exhibit 2# 31 Exhibit 3# 32 Exhibit 4# 33 Exhibit 5# 34 Exhibit 6# 35 Exhibit 7# 36 Exhibit 8# 37 Exhibit 9# 38 Exhibit 10# 39 Exhibit 11# 40 Exhibit 12) (slk, ) (Entered: 04/23/2003)

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06/10/2003 56 MOTION for summary judgment by plaintiff John H. Walton #173849; responses due 7/8/2003; (slk, ) (Entered: 06/10/2003)

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| 07/28/2003 | 58 | REPORT AND RECOMMENDATION that defendants' motion to dismiss (#32) be granted and plaintiff's motions for summary judgment (#36, #45, #56) be denied; objections to R&R due by 8/11/2003; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 07/28/2003) |

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|---|---|---|
| 09/08/2003 | 63 | OBJECTION by plaintiff John H. Walton #173849 to Report and Recommendation 58 (cam, ) (Entered: 09/08/2003) |

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| 10/14/2003 | 65 | OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION 58 re 32, 56, 45, 36; no good-faith basis for appeal; case closed; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 10/14/2003) |
| 10/14/2003 | 66 | JUDGMENT in favor of Defendants against Plaintiff; Defendants' motion to dismiss 32 GRANTED; Plaintiff's motion for summary judgment [36, 45, 56] DENIED; case DISMISSED without prejudice; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 10/14/2003) |

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| 10/29/2003 | 67 | NOTICE OF APPEAL re 66 by plaintiff John H. Walton #173849 (cam, ) (Entered: 10/29/2003) |

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**General Docket**
**US Court of Appeals for the Sixth Circuit**
**#03-2458**

Walton v. Bouchard, et al, et al

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| 11/17/03 | Prisoner Case Docketed. Notice filed by Appellant John H. Walton. (stb) |
| | * * * |
| 12/11/03 | BRIEF filed by John H. Walton for Appellant John H. Walton. Copies: 07. Certificate of service date 12/5/03 Number of Pages: 05++. [03-2458] (rgf) |
| | * * * |
| 2/2/04 | BRIEF filed by Kevin R. Himebaugh for Appellee Denise Gerth, Appellee Catherine Bauman, Appellee D. Bergh, Appellee Ken Gearin, Appellee Barbara Bouchard. Copies: 07. Certificate of service date 1/30/04. Number of Pages: 13. [03-2458] (rgf) |
| | * * * |
| 2/2/04 | Appellee MOTION : to waive the filing of an appendix. Motion filed by Kevin R. Himebaugh for appellees Bouchard, et al. Certificate of service 1/30/04. [03-2458] (stb) |
| 2/5/04 | ORDER filed granting appellees' motion to waive the requirement of filing a joint appendix as the record may be viewed electronically. [03-2458] (stb) |
| | * * * |
| 2/20/04 | REPLY BRIEF filed by John H. Walton for Appellant John H. Walton Copies: 07. Certificate of service date 2/17/04 [03-2458] (rgf) |

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| 12/7/04 | CAUSE SUBMITTED on briefs to panel consisting of Judges Gibbons, Sutton, Edgar sitting on 02/04/05. [03-2458] (kal) |

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| 6/17/05 | OPINION filed : the district court's dismissal of the complaint is AFFIRMED, decision not for publication pursuant to local rule 28(g) 6 pgs. [03-2458] Julia S. Gibbons, Jeffrey S. Sutton (AUTHORING), Circuit Judges; R. A. Edgar, District Judge (ED TN). (stb) |

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| 7/11/05 | MANDATE ISSUED with costs to be recovered by Appellee Barbara Bouchard, Appellee Ken Gearin, Appellee D. Bergh, Appellee Catherine Bauman, Appellee Denise Gerth. Amount: $47.25. [03-2458] (rgf) |

* * *

**FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983**

(Filed Aug. 12, 2002)

**In the United States District Court**
**For the Western District of Michigan**

JOHN H. WALTON 173849

(Enter above the full names of all plaintiffs, including prisoner number, in this action.)

v. 2:02 CV-117

BARBARA BOUCHARD, WARDEN, ADW KEN GERIN, ADW D. BERGH, ROM CATHY BAUMAN CASE MANAGER DENISE GERTH, RON BOB, ADW

Gordon I. Quist
U.S. District Judge

Timothy P. Greeley
U.S. Magistrate Judge

(Enter above the full name of the defendant or defendants in this action.)

**Instructions for Filing a Complaint by a Prisoner Under the Civil Rights Act, 42 U.S.C. § 1983**

This packet includes four copies of a complaint form. To start an action, you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original. **The clerk will not file your**

**complaint unless it conforms to these instructions and to these forms.**

In order for this complaint to be filed, it must be accompanied by the filing fee of $150.00. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to prepay the filing fee and service costs for this action, you must petition the court to proceed *in forma pauperis* by completing and signing the attached affidavit in support of application (pages 2-3). You must also have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. **If the court grants you leave to proceed *in forma pauperis*, you will still be required to pay the $150.00 filing fee through an initial partial filing fee and through monthly installments.**

Your complaint must be legibly handwritten or typewritten. You, the plaintiff(s), must sign and date the complaint on the last page. If you need additional space to completely answer a question, you must attach additional pages.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further you must file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

You are required to furnish, so that the United States Marshal can complete service, the **correct name and address of each person you have named as defendant.** A PLAINTIFF IS REQUIRED TO GIVE INFORMATION TO THE UNITED STATES MARSHAL TO

ENABLE THE MARSHAL TO COMPLETE SERVICE OF THE COMPLAINT UPON ALL PERSONS NAMED AS DEFENDANTS.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and copies to the Clerk of the United States District Court for the Western District of Michigan at any of the addresses below:

U.S. District Court
399 Federal Building
110 Michigan St., NW
Grand Rapids, MI 49503

U.S. District Court
229 Federal Building
P.O. Box 698
Marquette, MI 49855

U.S. District Court
B-35 Federal Building
410 W. Michigan Ave.
Kalamazoo, MI 49007

U.S. District Court
113 Federal Building
315 W. Allegan
Lansing, MI 48933

## COMPLAINT

### I. Previous Lawsuits

**CAUTION: The Prison Litigation Reform Act has resulted in substantial changes in the ability of incarcerated individuals to initiate lawsuits in this and other federal courts without prepayment of the required $150 filing fee. Accurate and complete responses are required concerning your litigation history. Generally, a plaintiff's failure to accurately and completely answer the questions set forth below will result in denial of the privilege of proceeding *in forma pauperis* and require you to pay the entire $150**

**filing fee regardless whether your complaint is dismissed.**

A. Have you ever filed a lawsuit while incarcerated or detained in any prison or jail facility?

Yes ☒ No ☐

B. If your answer to question A was yes, for each lawsuit you have filed you must answer question 1 through 5 below. Attach additional sheets as necessary to answer questions 1 through 5 below with regard to each lawsuit.

1. Identify the court in which the lawsuit was filed. If it was a state court, identify the county in which the suit was filed. If the lawsuit was filed in federal court, identify the district within which the lawsuit was filed.

Alger County Munising, Mich. Small Claims Court

2. Is the action still pending?
Yes ☐ No ☒

a. If your answer was no, state precisely how the action was resolved: dismissed without prejudice

3. Did you appeal the decision?
Yes ☐ No ☒

4. Is the appeal still pending?
Yes ☐ No ☒

a. If not pending, what was the decision on appeal? _____

5. Was the previous lawsuit based upon the same or similar facts asserted in this lawsuit?

Yes ☐ No ☒

If so, explain: _____

_____

**II. Place of Present Confinement Alger Max. Corr. Facility** _____

If the place of present confinement is not the place you were confined when occurrence that is subject of instant lawsuit arose, also list the place you were confined: _____

**III. Exhaustion of Administrative Remedies**

**CAUTION: You are required by federal law to exhaust your available remedies on any action brought with respect to jail, prison, or other correctional facility conditions prior to bringing an action under 42 U.S.C. § 1983 or any other federal law. Once again, failure to provide complete and accurate answers to the questions set forth below will likely result in denial of the privilege of proceeding *in forma pauperis*. ATTACH COPIES OF ALL DOCUMENTS EVIDENCING EXHAUSTION OF REMEDIES.**

A. Is your place of confinement a facility operated by the Michigan Department of Corrections?

Yes ☒ No ☐

B. If your answer to A was yes, did you file a grievance concerning the facts set forth in this complaint?

Yes ☒ No ☐

1. If your answer is no, explain why a grievance was not filed: _____

_____

2. If your answer is yes, list the grievance number(s) and the date listed as "Today's Date" box on the Prisoner/Corrections Client Grievance Form: 5/4/02

3. What was the decision upon your grievance at Step I? Stated:No Racial Discrimination

C. If your answers to A and B are yes, did you appeal the Step I decision?

Yes ☒ No ☐

1. If your answer above was yes, what was the Step II decision? Stated I showed No New Evidence

Did you appeal to Step III?

Yes ☒ No ☐

If your answer above was yes, what was the decision at Step III? Stated: The Evidence does Not Support The Charges

D. Does your complaint concern a misconduct charge filed against you?

Yes ☒ No ☐

1. Did you have an administrative hearing on the misconduct charge?

Yes ☐ No ☐

If yes, what was the hearing officer's decision? Guilty Based On The C/O's Statement

2. Did you request an administrative rehearing?

Yes ☒ No ☐

If you did request an administrative rehearing, what was the decision rendered upon rehearing? If you did request an administrative rehearing, what was the decision rendered upon rehearing? Denied

3. After rehearing, did you appeal the decision in one of the circuit courts for the State of Michigan?

   Yes ☐ No ☒

   a. If yes, what was the decision of the circuit court? _____

   b. Did you appeal the decision of the circuit court?

      Yes ☐ No ☒

      If yes, state the decisions of the Michigan Court of Appeals and Michigan Supreme Court: _____

      _____

E. If your claim concerns confinement within a facility not operated by the Michigan Department of Corrections, please state in detail the steps you have taken to exhaust your available state remedies prior to filing this lawsuit: _____

F. If you have taken any other steps to exhaust your state remedies, please describe in detail what steps you have taken: I've Written Several Letter(s) To The Warden ADW(S) ROM, Case Manager

STATEMENT OF CLAIMS (CONT)

This is a 1983 Action Filed by John Walton, A State Prisoner, Alleging Violation Of his Constitutional Rights

(5) And (14th) Of Equal Protection Law. Am Seeking Compensatory and Punative Damages.

/s/ John H. Walton
John H. Walton

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## IV. Parties

In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of Plaintiff John H. Walton

Address Alger Max Corr. Facility – Munising Mich

In Item B below, place the full name of the defendant in the first blank, his or her official position in the second blank and his or her place of employment in the third blank. Use Item C for the names, positions and place of employment of all additional defendants. Attach extra sheets as necessary. **State whether your are suing each defendant in an official or personal capacity.**

B. Defendant Ken Gerian is employed as Deputy Warden at Alger Max Corr Facility

C. Additional Defendants Warden: Barbra Bouchard ADW; D. Bergh ADW, Ron Bobo ADW, Rom Cathy Bouman, Case Manager Denise Gerth

## V. Statement of Claim

State here, as briefly as possible, the **facts** of your case. Describe how each defendant is personally involved. Include also, the names of other persons involved, dates and places. **Do not give any legal**

**arguments or cite any cases or statutes.** If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.

On 7/17/01 I Was Placed On A Sanction Called "Upper Slot" (Indefinite) by Ken Gearin, Deputy Warden. While White Prisoner(s) was given less Sanction(s) For The Same 008 Assult/Staff Victim. I've Written Letters To The Warden, To The New Deputy Warden D. Bergh, I've Spoken To RUM Bouman Several Time I've Spoken Case Manager Gerth Several Times, I Spoken Written To The Inspecter Schtuz.

#1.) Ken Gerin Deputy Warden is Who Placed Me On Indefinite Upper Slot

#2.) Barbra Bouchard, The Warden, has been Kited Several Times Concerning This discrimination

#3.) D. Bergh, The "New" Deputy Warden Has Been Kited Several Times Concerning This discrimination

#4.) Cathy Bauman, The RUM Has Been Kited And Ive Spoken To Her Several Times Concerning This discrimination.

#5.) Denise Gerth, The Case Manager, Whom Ive Spoken To, Kited Several Times Was Well Aware Of The discrimination.

#6.) This 1983 Form is About (Racial discrimination Of Sanctions Imposed

# Ron Bobo, ADW Was Also Kited.

**VI. Relief**

State briefly and precisely what you want the court to do for you.

_____

_____

_____

_____ _____

Date Signature of Plaintiff

NOTICE TO PLAINTIFF(S)

The failure of a *pro se* litigant to keep the court apprised of an address change may be considered cause for dismissal.

[Handwritten]

RELIEF

Plaintiff, Respectfully Requests That This Honorable Court Grant Him The Following Relief:

A Any Declaratory Judgment/Ruling deemed Fair Just And Approprate.

B. Any junctive Relief deed Fair And Just And Approprate

C. Order defendants To Rescind & Revoke upperslot Restriction.

D. Grant Compensatory damages in The Amount Of 1.#) $250,000.$^{oo}$ Against Each defendant in Their Official Capacities.

E. Grant Punative Damages in The Amount Of 1.$250,000.$^{oo}$ Against Each Named defendant in Their

Official Capacities #2.)$250.000.$^{00}$ Against Each Named Defendant in Their Personal Capacities.

F. Fee & Cost To Plaintiff For Time Spent And Expensatures litigating This Action.

G. Attorney Fees Pursuant To 42 USC 1988

H. Any Other Relief deemed Fair Just And Appropriate

Respectfully
Submitted

7/18/02 John H. Walton

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[Handwritten]

AFFIDAVIT OF JOHN H. WALTON

1.) That I Am A State Prisoner Currently Confined At Alger Max Corr Facility, Musining Mich,

2.) I have been At Alger Max Facility Since 3/26/99.

3.) On 7/17/01 While In (Adm Sec.) I Was Written A Major Misconduct 008 Assault On Staff.

4.) C/O Stated That during Evening Meal I hit him on the left Wrist With My Food Tray

5.) On 7/17/01 I Was Placed On Indefinate Upper Slot Restriction by Deputy Warden Ken Gerain.

6.) I Am A "Black" Man Prisoner

7.) A White Prisoner ___ Gross #223745 Was Written A 008 Assaualt On Staff On March ?? 02.

8.) The White Prisoner is No Longer On Upper Slot Restriction (Sanction.)

9.) Prisoner Gross, Was Only Given (60) days of Upper Slot Restriction.

10.) Another White Prisoner James Sarah, #280314; Was Written A 008 Assult On Staff.

11.) Prisoner Sarah #280314 is No Longer On Upper Slot Sanction.

12.) Please Note: That Prisoner Sarah 280314 has been On Upper Slot Sanction (3) Three Times

13.) Due To Me being Placed On Upper Slot Sanction I have been Written Over 15 Major Tickets Related To Upper Slot.

14.) On 7/22/01 I Was Written A Disobeying A direct Order Misconduct. (D.D.O.)

15.) On 7/25/01 I Was Written A D.D.O.

16.) On 11/20/01 I Was Written A D.D.O.

17.) On 11/21/01 I Was Written A D.D.O.

18.) On 11/28/01 I Was Written A D.D.O.

19.) On 2/17/02 I Was Written A D.D.O.

20.) On 2/27/02 I Was Written A D.D.O.

21.) On 5/23/02 I Was Written A D.D.O.

22.) I have Written Several Grievances Concerning My Upper Slot And Not being Feed.

23.) On 1/27/02 I Wrote A Grievance Acting Deputy Ron Babo, Said it Was Not Grievable

24.) On 3/3/02 I Wrote A Grievance Dep Warden D. Bergh, Rejected My Grievance.

25.) On 3/11/02 I Wrote A Grievance Dep. D. Bergh Rejected My Grievance.

26.) On 4/19/02 I Wrote A Grievance Concerning The degrading Manner in Which C/O's Was Treating Me.

27.) On 4/29/02 I Wrote A Grievance Again For Not being Feed

28.) On 5/23/02, I Wrote A Grievance Again About Not being Feed.

29.) I have Written Several Letters And Kite(s) To The Adm "Heads" No Reply From None Of Them.

30.) On 11/25/01 I Wrote The Warden B. Bouchard, No Response.

31.) On 12/?/01 Again I Wrote Warden B. Bouchard, No Response.

32.) On 2/17/02 I Wrote The Director Bill Martin No Response.

33.) On 3/24/02 I Wrote ADW Ron Bobo, No Reply.

34.) On 4/22/02 I Wrote Kathleen Hawk, Director Bureau Of Prison(s) Wash, DC No Response.

35.) On 4/29/ I Wrote The Warden, ADW Bergh, The Inspector, No Response.

36.) On 5/14/02 I Wrote Dep. Warden D. Bergh, No Response.

37.) On 6/13/ I Wrote The Inspector No Reply.

38.) Upper Slot is A Restriction/Sanction That is Surpose To be Reviewed Every (7) days by the dep Warden

39.) A Prisoner is Only To Remain On A Sanction If He/She is disruptive.

40.) Upper Slot is A Restriction/Sanction Where (2) Two Officer Are Needed.

41.) Without A Supervior Present "Most" Officer Will Lie And Not Feed Me

42.) Due To The Racial discrimination Of The Sanction I have been belittled, Abused And degraded.

43.) The Above Named defendants Each Showed A deliberate Indifference And Each Was Aware Of The discrimantion but Refused To do Anything.

44.) The Above Named defendants Each demonstrated Intentional And Purposelful discrimination None Responsed And None Looked Into My Claim

45.) My Complaint is About The discrimination Of The Sanction And Equal Protection Under The (5th) And (14th) Admendment.

/s/ John H. Walton
JOHN H. WALTON

Sworn To before Me This
___ day of Aug. ___ 2002

Notary Public

[Handwritten]

John H. Walton

Plaintiff

v

Barbara Bouchard

defendants et. al

Case No. 2:02-CV-117

(Filed Nov. 18, 2002)

Amendment of Complaint
For Incorrect date And demand For Jury Trail.

Assistant Attorney General

The Correct date in Which I Was Placed On Indefinite Upper Slot Was July 17, 2001 Not July 17, 2002. Also, The Plaintiff Demands That He has A Jury Trail.

/s/ John H. Walton

Lynne Phillip
11/13/02
3/1/2006
Notary Alger County

| MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE** | EFFECTIVE DATE 11/01/00 | NUMBER 03.02.130 |
|---|---|---|
| | SUPERSEDES 03.02.130 (10/11/99) | |
| SUBJECT PRISONER/PAROLEE GRIEVANCES | AUTHORITY MCL 24.207(k); 791.203 | |
| | ACA STANDARDS 3-4017, 3-4173, 3-4271, 3-4331, 3 ACRS 3D-07 | |
| | PAGE 1 OF 7 | |

I. POLICY STATEMENT: Prisoners and parolees shall be provided with an effective method of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement.

II. POLICY:

DEFINITIONS

A. Grievant – A prisoner or parolee who files a grievance.

B. Respondent – The staff person who investigates and responds to a grievance.

GENERAL INFORMATION

C. For purposes of this policy, "Warden" includes the Administrator of the Special Alternative Incarceration Program facility (SAI), unless otherwise specified.

D. The grievance process shall be equally available to all prisoners housed in Correctional Facilities Administration (CFA) and Field

Operations Administration (FOA) facilities and all parolees, unless placed on modified access pursuant to this policy. Prisoners at the Michigan Youth Correctional Facility shall utilize the grievance process as set forth in PD 05.01.145 "Michigan Youth Correctional Facility".

E. Grievances may be submitted regarding alleged violations of policy and procedure or unsatisfactory conditions of confinement which directly affect the grievant. This includes alleged violations of this policy and related procedures. A grievant may grieve the *application* of a policy or procedure only if it affects him/her personally and it is something over which the Department has control. A prisoner or parolee may not grieve the *content* of policy or procedure. If a CFA prisoner has a concern with the content of a policy or procedure which personally affects the prisoner, s/he may direct comments to the Warden's Forum through the housing unit representative as provided in PD 04.01.150 "Prisoner Housing Unit Representatives/Warden's Forum". A copy of all Warden's Forum minutes shall be sent to the Prisoner Affairs Section, Office of Program Services (OPS),

Administration and Programs (A&P), for review of all issues relevant to policy and procedure and the prisoner grievance process.

F. Grievances that raise the following non-grievable issues shall be rejected by the Grievance Coordinator.

1. Decisions made in hearings conducted by hearing officers of the Hearings and Appeals Division of the Office of Policy and Hearings, and decisions made in minor misconduct hearings;
2. The content of administrative rules, policy directives, operating procedures and Director's Office Memoranda;
3. Decisions made by the Parole Board and recommendations made by its hearing officers to grant, rescind, amend or revoke parole;
4. Issues which affect the entire prisoner population or significant numbers of prisoners. Such issues in CFA may be brought to the attention of the administration as provided in PD 04.01.150. Two or more prisoners may not jointly file a single grievance regarding an issue of mutual

impact or submit identical individual grievances regarding a given issue as an organized protest.

G. Prisoners and parolees are required to file grievances in a responsible manner. A grievance shall be rejected by the Grievance Coordinator if it contains profanity, threats of physical harm or language which demeans the character, race, ethnicity, physical appearance, gender, religion or national origin of any person, unless it is part of the description of the grieved behavior and is essential to that description. A grievance *may* be rejected for the following reasons:

1. It is duplicative, vague, illegible or contains multiple unrelated issues.
2. The grievant does not indicate s/he attempted to verbally resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control.
3. The grievance is filed in an untimely manner. The grievance shall not be rejected if the grievance provides a valid reason for the delay; e.g., transfer.

H. A prisoner or parolee whose grievance is rejected may appeal the rejection to the next step as set forth in this policy.

I. Grievances shall not be placed in Counselor files, Record Office files, field files or Central Office files, nor shall they be referenced on any document placed in these files except as necessary pursuant to Paragraph K. Grievance documents and files shall be accessed only to investigate or respond to a pending grievance, to respond to a request under the Freedom of Information Act, to respond to a request from the Office of the Legislative Corrections Ombudsman, the Department of Attorney General or appropriate Central Office staff, for audits, or for statistical reporting.

J. A grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process. Staff shall avoid any action that gives the appearance of reprisal for using the grievance process or for assisting other grievants in its use. If a grievant believes s/he has been subjected to acts of reprisal, s/he may file a grievance.

K. If a grievant intentionally files a grievance which is investigated

and determined to be unfounded which, if proven true, may have caused an employee or a prisoner to be disciplined, or may have caused an employee to be subjected to corrective action, the grievant may be placed on modified access consistent with Paragraphs JJ through NN of this policy. In addition, if the grievant is a prisoner, s/he may be issued a misconduct report if approved by the Warden or Area Manager. The misconduct report shall be processed as set forth in PD 03.03.105 "Prisoner Discipline".

L. Wardens and FOA Area Managers shall ensure a prisoner is provided assistance in completing a grievance form, if needed. In such cases, assistance shall be provided by a staff member who is not involved in the grievance.

M. The OPS Administrator shall ensure that a computerized grievance tracking system is developed and made available for use by OPS and Grievance Coordinators.

HURON VALLEY CENTER

N. Grievances filed by a prisoner at the Huron Valley Center (HVC) involving the prisoner's incarceration (e.g., time computation, disciplinary credits, good time, annual review and restoration,

access to law books from the Huron Valley Men's Facility) shall be forwarded to the Grievance Coordinator at the Huron Valley Men's Facility for processing and response.

O. Grievances filed by a prisoner at HVC relating to the prisoner's treatment and living conditions (e.g., quality of the food, room temperatures, not receiving hygiene items, complaints regarding staff, visitor restrictions that are incorrectly imposed) shall be responded to by the Department of Community Health (DCH), using the patient grievance process developed by DCH. Grievances answered at the Step III level by the Director of the Bureau of Forensic Mental Health Services shall be forwarded to the Prisoner Affairs Section, OPS, for record keeping.

Grievance Coordinators

P. In SAI and in each CFA institution, the Warden shall designate at least one staff member to serve as Step I and Step II Grievance Coordinators. The FOA Deputy Director shall designate staff members to serve as Step I and Step II Grievance Coordinators for each FOA field office, corrections center and Technical Rule Violation Center (TRV).

Step I Grievance Coordinator

Q. The responsibilities of the Step I Grievance Coordinator shall include:

1. Logging in and assigning a number to each Step I grievance, including those which may be rejected or returned to the grievant for any reason. Where available, the Grievance Coordinator shall use the computerized grievance tracking system to log in and assign numbers to Step I grievances.
2. Rejecting grievances consistent with this policy and returning to the grievant with explanation as to the reason for rejection.
3. Reviewing each grievance accepted at Step I and assigning a respondent to interview the grievant and prepare a written response to the grievance.
4. Ensuring that a response is prepared for each Step I grievance accepted, that a thorough investigation of the grievance is completed, and that the response is reviewed by the respondent's supervisor and is returned to the Grievance Coordinator within the prescribed time limits.

5. Preparing and submitting monthly reports to the Prisoner Affairs Section, OPS, as directed by the OPS Administrator.

6. Processing extension requests as set forth in Paragraph V.

7. Processing Step III responses returned from the Prisoner Affairs Section, OPS.

R. The Grievance Coordinator may respond at Step I to grievances which can be responded to with minimal investigation or rejected for reasons authorized by this policy. However, if the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted as required in Paragraph AA.

Step II Grievance Coordinator

S. The responsibilities of the Step II Grievance Coordinator shall include:

1. Logging in each Step II grievance, including those which may be rejected or returned to the grievant for any reason. Where available, the Grievance Coordinator shall use the computerized grievance tracking system to log in Step II grievances.

2. Rejecting grievances consistent with this policy and

returning to the grievant with explanation as to the reason for rejection.

3. Reviewing each grievance accepted at Step II and assigning a respondent.

4. Ensuring that a response is prepared for each Step II grievance accepted, that further investigation is completed as needed, and the grievance is returned to the coordinator within the prescribed time limits.

GRIEVANCE PROCESS

T. In an effort to resolve grievable issues as soon as possible, prior to submitting a written grievance, the grievant shall attempt to verbally resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond his/her control. If the complaint is not resolved, the grievant may file a Step I grievance. A Step I grievance also may be filed in accordance with OP 03.02.130-A "State Administrative Board Prisoner Property Reimbursement" if the grievance is seeking reimbursement for property lost or destroyed while in the Department's sole possession. If the grievant is dissatisfied with

the Step I response, or does not receive a timely response, s/he may appeal to Step II. If the grievant is dissatisfied with the Step II response, or does not receive a timely response, s/he may appeal to Step III.

U. The grievant shall use the Prisoner/Parolee Grievance form (CSJ-247A) to file a Step I grievance and the Prisoner/Parolee Grievance Appeal form (CSJ-247B) to file a Step II or Step III grievance. The information provided shall be limited to the issue being grieved, and shall be as specific as possible. Information shall be confined to the form and shall not be written on the back, sides or margins of the form, or in the response area. Additional pages may be attached, if necessary. However, grievants are encouraged to limit the information to the grievance form. If additional pages are used, the grievant shall submit four copies of each additional page. Grievants may handwrite the grievance provided the handwriting is legible.

V. The total grievance process from the point of filing a Step I grievance to providing a Step III response shall be completed within 90 calendar days unless an extension of 15 business days has been requested by the Grievance

Coordinator or the Prisoner Affairs Section at one of the steps in the grievance process, and has been granted by the grievant. The Grievance Coordinator shall provide the grievant with a copy of the approval with the grievance response. If an extension is requested by the Grievance Coordinator or the Prisoner Affairs Section, but it is not granted by the grievant, the respondent shall note this in the response. Time limitations shall be adhered to by the grievant and staff in all steps of the grievance process.

W. If a grievant chooses to pursue a grievance which has not been responded to by staff within the required time frames set forth below, the grievant may forward the grievance to the next step of the grievance process within ten business days after the response deadline expired, including any extensions which have been granted.

X. Prisoners and staff who may be involved in the issue being grieved shall not participate in any capacity in the grievance investigation, except as necessary to provide information to the respondent.

Step I

Y. Within five business days after discussing a grievable issue with

staff, a grievant may submit a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility, field office or other office being grieved. If the office being grieved does not have a designated Grievance Coordinator, the grievant shall submit the grievance to the Step I Grievance Coordinator for the facility in which s/he is housed or appropriate field office for processing.

Z. The Grievance Coordinator shall assign an appropriate respondent and identify the date by which the response is due. If the issue is of an emergent nature, the Grievance Coordinator may ~~order~~ a Step I response within two business days. The respondent shall generally be the supervisor of the person being grieved. The respondent for grievances involving hearing officers or hearings conducted by the Office of Policy and Hearings shall be the Administrator of the Office of Policy and Hearings or designee. The respondent for grievances involving the Parole Board shall be the Parole Board Chairperson or designee.

AA. The grievant shall be interviewed by the respondent unless the grievant refuses to participate in

the interview, or the respondent is not assigned to the location at which the prisoner is confined or does not have ready access to the FOA office to which the parolee is assigned. If the grievant is not interviewed, the reason shall be included in the written response to the grievance. The grievant shall have the opportunity to explain the grievance more completely at the interview, enabling the Step I respondent to gather any additional information needed to respond to the grievance. The interview also provides the opportunity to resolve the grievance to the mutual satisfaction of the grievant and the Department.

BB. The Step I respondent shall identify in the response the policies, rules or procedures that are directly related to the issue or conduct being grieved. Each Step I grievance response shall be reviewed by the respondent's supervisor prior to the grievance being returned to the Step I Grievance Coordinator to ensure that it appropriately addresses the issue raised in the grievance and accurately reflects Department policy and procedure. Where there is limited staffing in an FOA field office, corrections center or TRV, the requirement

for supervisory review of a Step I response shall not apply if the response is prepared by an FOA supervisor/manager.

CC. A Step I grievance response shall be returned to the grievant by the Step I Grievance Coordinator within 15 business days after receipt of the grievance, unless an extension has been granted pursuant to Paragraph V.

Step II

DD. If a grievant is dissatisfied with the response received at Step I, s/he may request a Prisoner/Parolee Grievance Appeal form (CSJ-247B) from the Step I Grievance Coordinator within five business days after receiving the Step I response. The grievant must submit the completed form CSJ-247B to the Step II Grievance Coordinator designated for the facility, field office or other office being grieved within five business days after receiving the CSJ-247B from the Step I Grievance Coordinator.

EE. The Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The respondents for Step II grievances shall be as follows:

1. The Warden in CFA facilities and SAI, except that s/he

may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised. If the Warden supervises a camp, s/he may delegate this responsibility for camp grievances to the Assistant Deputy Warden at the camp.

2. The appropriate Area Manager for FOA area offices, corrections centers and TRVs.

3. The Regional Health Administrator or designee in grievances alleging inadequate medical care.

4. The Administrator of the Bureau of Correctional Industries or designee for grievances involving that Bureau.

5. The Administrator of the Office of Policy and Hearings for grievances involving that Office.

6. The Parole Board Chairperson for grievances involving the Parole Board.

7. The Regional Business Manager for Region III, CFA, in grievances involving administrative support functions for CFA facilities in Jackson.

FF. A Step II grievance response shall be returned to the grievant by the Step II Grievance Coordinator

within 15 business days after receipt of the Step II grievance, unless an extension is granted pursuant to Paragraph V.

Step III

GG. If a grievant is dissatisfied with the response received at Step II, s/he may file a Step III grievance by completing a Prisoner/Parolee Grievance Appeal form (CSJ-247B) and submitting it to the Prisoner Affairs Section, OPS, within ten business days after receiving the Step II response.

HH. The Director or designee shall be the respondent for Step III grievances.

II. A grievant may file a grievance alleging racial or ethnic discrimination and staff brutality or corruption directly to Step III. A grievant also may file a grievance directly to Step III regarding his/her removal as a housing unit representative by the Warden or CFA Deputy Director pursuant to PD 04.01.150 "Prisoner Representatives". Upon receipt, the grievance shall be carefully reviewed to determine whether to respond directly to the grievance, request an investigation into the issue raised in the grievance, or return it to the grievant for filing at Step I.

MODIFIED ACCESS

JJ. A prisoner or parolee who files an excessive number of grievances which are frivolous, vague, duplicative, non-meritorious, raise non-grievable issues, or contain prohibited language as set forth in Paragraph G, or who files an unfounded grievance as set forth in Paragraph K, may have access to the grievance process limited by the Warden or FOA Area Manager for an initial period of not more than 90 days. If the prisoner or parolee continues to file such grievances while on modified access, the Warden or FOA Area Manager may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation.

KK. The Warden or FOA Area Manager, as appropriate, shall ensure that a prisoner or parolee placed on modified access, or who that status extended, is immediately notified in writing of this determination. The Warden or FOA Area Manager also shall immediately notify the Prisoner Affairs Section, OPS, in writing whenever s/he places a prisoner or parolee on modified access or extends that status.

LL. The Prisoner Affairs Section, OPS, also may place a prisoner or parolee on modified access for the reasons set forth in Paragraph JJ. The Prisoner Affairs Section shall immediately notify in writing each prisoner or parolee it places on modified access or who has that status extended. The Prisoner Affairs Section also shall immediately notify the appropriate Warden or FOA Area Manager in writing of this determination.

MM. While on modified access, the prisoner or parolee shall be able to obtain grievance forms only through the Step I Grievance Coordinator. A grievance form shall be provided if the Step I Grievance Coordinator determines that the issue the prisoner or parolee wishes to grieve is grievable and otherwise meets the criteria outlined in this policy. The Grievance Coordinator shall maintain a record of requests received for grievance forms and whether the request was approved or denied. If a prisoner or parolee on modified access attempts to file a grievance using a form not provided by the Grievance Coordinator, the prisoner or parolee shall be notified that the grievance will not be processed.

The Warden or FOA Area Manager also may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation.

NN. A prisoner or parolee shall remain on modified access for the approved period even if transferred to another facility.

OPERATING PROCEDURE

OO. The OPS Administrator shall ensure that within 60 days of its effective date operating procedures necessary to implement this policy directive is developed.

III. AUDIT ELEMENTS:

PP. A Primary Audit Elements List has been developed and will be provided to Wardens, the SAI Administrator, FOA Regional Administrators and the OPS Administrator to assist with self audit of this policy, pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

APPROVED: /s/ Bill Martin 10/9/00

Bill Martin, Director Date

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

Case No. 2:02-cv-117
HON. GORDON J. QUIST

BARBARA BOUCHARD, et al.,

Defendants. /

REPORT AND RECOMMENDATION

Plaintiff John H. Walton, an inmate at the Alger Maximum Correctional Facility (LMF), filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against defendants Warden Barbra Bouchard, Deputy Warden Ken Gearin, ADW D. Bergh, ADW Ron Bobo, ROM Cathy Bauman, and Case Manager Denise Gerth.

Plaintiff alleges that he was discriminated against based upon his race when he was given an indefinite upper slot restriction after assaulting an officer. Plaintiff, who is black, has asserted that white prisoners who assaulted officers received an upper slot restriction for only a limited time period. Plaintiff names two white prisoners who assaulted officers and were given upper slot restrictions that have now been lifted.

Defendants move to dismiss the complaint for failure to exhaust grievance remedies. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust available administrative remedies. *See Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983 (2002); *Booth v. Churner*, 532

U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *See Porter*, 122 S. Ct. at 988; *Booth*, 532 U.S. at 741; *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir.), *cert. denied*, 531 U.S. 1040 (2000); *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). A district court must enforce the exhaustion requirement sua sponte. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.), *cert. denied*, 525 U.S. 833 (1998); *accord Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999).

After defendants filed their motion to dismiss, plaintiff for the first time submitted copies of the grievances that he filed on this issue. Plaintiff did file a grievance through Step III of the grievance process asserting that he was discriminated against due to his race when he received an indefinite upper slot restriction. Plaintiff, however, only filed his grievance against defendant Bobo. Plaintiff failed to mention the other named defendants in his grievances, even after the Step I response informed plaintiff that defendant Gearin was responsible for giving him the restriction.

Because Plaintiff exhausted his claim against only one of the named Defendants, the court can dismiss this action pursuant to the "total exhaustion" rule. Under the total exhaustion rule, the presence of an unexhausted claim results in the dismissal of the entire action. Currently, a split exists in this District concerning the validity of the "total exhaustion" interpretation of 42 U.S.C. § 1997e(a). *Smeltzer v. Hook*, 235 F. Supp. 2d 736 (W.D. Mich. 2002) (applying total exhaustion rule) (comparing *Keenan v. Twommy*, No. 1:97-cv-549 (W.D. Mich. July 29, 1999) (applying total exhaustion rule) with *Jenkins v. Toombs*,

32 F. Supp. 2d 955 (W.D. Mich. 1999) (rejecting total exhaustion rule). In *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000), *cert. denied* 531 U.S. 1040, 121 S. Ct. 634 (2000), the Sixth Circuit "reserve[d] to another day the question of whether 'exhausted claims' in a 'mixed complaint' should be addressed when such claims would otherwise meet the pleading requirement or whether such claims should be dismissed in their entirety."

In *Smeltzer*, the court noted that the majority of courts that have addressed the issue have applied the total exhaustion rule. 235 F. Supp. 2d at 743. In addition, the court noted that the total exhaustion rule is supported both by the plain meaning of 42 U.S.C. § 1997e(a) and strong policy interests. *Smeltzer*, 235 F. Supp. 2d at 743. Section 1997e(a) provides, "No *action* shall be brought with respect to prison conditions under section 1983 of this title . . . until such administrative remedies as are available are exhausted." 28 U.S.C. § 1997e(a). As noted in *Smeltzer*, Congress indicated that a prisoner is required to exhaust all claims before his action may proceed by using the word "action" instead of "claim." *Smeltzer*, 235 F. Supp. 2d at 744.

As noted by the court in *Smeltzer*, if Congress had intended to permit the piecemeal adjudication of claims relating to prison conditions, the statute would have precluded the bringing of unexhausted *claims* rather than *actions*. 235 F. Supp. 2d at 744 (emphasis in original). Section 1997e(c)(1) provides that the district court shall dismiss any "action" which is frivolous, malicious, or fails to state a claim. In contrast, § 1997e(c)(2) provides that the district court may dismiss a "claim" which is frivolous, malicious or fails to state a claim without first requiring exhaustion of administrative remedies. It is apparent that

Congress realized that requiring dismissal without prejudice under § 1997(a) might prevent a court from dismissing with prejudice for frivolousness or failure to state a claim. Therefore, Section 1997e(c)(2) serves to reconcile § 1997(a) and § 1997(e)(1) by permitting a court to dismiss an unexhausted claim as frivolous, thus preventing an unexhausted claim from 'holding up' the dismissal of a frivolous action comprising otherwise exhausted claims." *Smeltzer*, 235 F. Supp. 2d at 744.

In *Smeltzer*, the court noted that the general intent of the PLRA and other strong policy arguments offer additional support for a total exhaustion rule. As noted by the Eleventh Circuit, Congress amended § 1997e(a) largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts. *Smeltzer*, 235 F. Supp. 2d at 744 (citing *Alexander v. Hawk*, 159 F.3d 1321, 1326 n.11 (11th Cir. 1998) (citing 141 Cong. Rec. H14078-02, *H14105 (daily ed. Dec. 6, 1995)). "Congress desired 'to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.'" *Id.* (quoting 141 Cong. Rec. S14408-01, *S14418 (daily ed. Sept. 27, 1995)).

The total exhaustion rule advances the goals of the PLRA by discouraging frivolous prisoner litigation and conserving judicial resources. *Smeltzer*, 235 F. Supp. 2d at 744-45. The total exhaustion rule also discourages prisoners from bringing unexhausted or frivolous claims. If only the unexhausted claims were dismissed from a mixed complaint, there is nothing to deter prisoners from raising unexhausted claims indiscriminately. Moreover, the assessment of a second filing fee after the prisoner has

properly exhausted all of his claims also serves as a deterrent against filing unexhausted or frivolous claims. *Smeltzer*, 235 F. Supp. 2d at 745.

In addition, the court in *Smeltzer* held that application of a total exhaustion rule in the civil rights context promotes comity in much the same way as in the habeas corpus context, where the total exhaustion rule is clearly established. 235 F. Supp. 2d at 745. Regarding the amendments by the PLRA to § 1997e(a), the *Smeltzer* court quoted *Brown v. Toombs*, 139 F.3d at 1103, as follows:

> The new statute has extensive benefits. It recognizes that it is difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison cases under § 1983. As Justice Stewart stated in *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973):
>
> > Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of these problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficient and properly handled by the state administrative bodies and the state courts, which are for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with these grievances.

*Smeltzer*, 235 F. Supp. 2d at 745.

As concluded by the court in *Smeltzer*, the principles of comity require that prison officials have a full opportunity to address claims raised by prisoners before they are brought to federal court. "By requiring total exhaustion, the federal courts not only will promote comity, but also will reap the benefits of 'more focused complaints and more developed evidentiary records.'" *Smeltzer*, 235 F. Supp. 2d at 745 (citing *Rivera v. Whitman*, 161 F. Supp. 2d 337, 343 (D.N.J. 2001).

Moreover, in *Storey v. Hutchinson*, 56 Fed. Appx. 228 (6th Cir. 2003), the Sixth Circuit recently affirmed the dismissal of a prisoner civil rights complaint for lack of complete exhaustion of remedies. 56 Fed. Appx. at 229. In *Storey*, the Plaintiff had submitted affidavits that no grievance procedure was available to him, but later recanted and filed documents showing that he had exhausted his available remedies as to some of the many claims he raised. The district court dismissed the suit pursuant to 42 U.S.C. § 1997e because of Plaintiff's failure to show that he had exhausted all available administrative remedies. *Id.* In affirming the dismissal, the court stated that the PLRA requires a prisoner to exhaust all available administrative remedies before filing a civil rights action in federal court, and that when a prisoner fails to exhaust his administrative remedies before filing his complaint, or only partially exhausts his remedies, dismissal of the complaint is appropriate. *Id.*

Plaintiff has filed separate requests for summary judgment in his favor because he asserts that he exhausted his grievance remedies. Plaintiff adopts defendants' motion to dismiss as support for his claim of entitlement to summary judgment. First, plaintiff has not completely exhausted his grievance remedies against each

of the named parties. Second, even if he did exhaust grievance remedies, exhausting grievance remedies does not provide a necessary factual basis to prevail on the merits of the claim. Plaintiff has failed to show that no genuine issue of material fact exists for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Accordingly, it is recommended that defendants' motion to dismiss (Docket #32) be granted, dismissing plaintiff's complaint without prejudice for failure to exhaust grievance remedies. It is further recommended that plaintiff's motions for summary judgment (Docket ## 36, 45 and 56) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten days of your receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR. 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal of those issues or claims addressed or resolved as a result of the Report and Recommendation. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
Timothy P. GREELEY
UNITED STATES
MAGISTRATE JUDGE

Dated: July 28, 2003

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

Case No. 2:02-cv-117
HON. GORDON J. QUIST

BARBARA BOUCHARD, et al.,

Defendants. /

**OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on July 28, 2003. The Report and Recommendation was duly served on the parties. The Court has received objections from the plaintiff. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Plaintiff argues that his complaint should not be dismissed for failure to exhaust grievance remedies. Plaintiff exhausted his grievance remedies against only one of the named defendants. Plaintiff failed to exhaust his grievance remedies against each of the named defendants. The Magistrate Judge recommended dismissal under the total exhaustion rule. Plaintiff's objection urges the court not to adopt a total exhaustion rule. However, since the total exhaustion rule advances the goals of the Prisoner Litigation Reform Act, plaintiff's complaint is

dismissed for failure to exhaust his grievance remedies. *Storey v. Hutchinson*, 56 Fed. Appx. 228(6th Cir. 2003); *Smeltzer v. Hook*, 235 F.Supp. 2d 736 (W.D. Mich. 2002).

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

The court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the court grants defendants' motion to dismiss, the court discerns no good-faith basis for an appeal. Should the plaintiff appeal this decision, the court will assess the $105 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the $105 appellate filing fee in one lump sum.

Dated: October 14, 2003

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

BARBARA BOUCHARD, et al.,

Defendants. /

Case No. 2:02-cv-117
HON. GORDON J. QUIST

**JUDGMENT**

In accordance with the Opinion and Order entered this date,

IT IS HEREBY ORDERED that defendants' motion to dismiss (Docket #32) is granted, and this case is DISMISSED without prejudice for failure to exhaust grievance remedies.

IT IS FURTHER ORDERED that plaintiff's motions for summary judgment (Docket ##36, 45 and 56) are denied.

Dated: October 14, 2003

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
**File Name: 05a0515n.06**
**Filed: June 17, 2005**

**No. 03-2458**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| JOHN H. WALTON, Plaintiff-Appellant, v. BARBARA BOUCHARD, KEN GEARIN, D. BERGH, CATHERINE BAUMAN, and DENISE GERTH, Defendants-Appellees. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN |

Before: GIBBONS and SUTTON, Circuit Judges; EDGAR, District Judge.*

SUTTON, Circuit Judge. John Walton, an inmate at the Alger Maximum Correctional Facility in Munising, Michigan, filed this § 1983 action claiming racial discrimination by several prison employees. The district court granted the employees' motions to dismiss on procedural, not substantive, grounds, determining that Walton did not exhaust his administrative remedies as to each defendant named in the suit in accordance with 42 U.S.C. § 1997e(a). On the basis of § 1997e(a) and this court's recent decision

* The Honorable Robert Allan Edgar, Chief United States District Court Judge for the Eastern District of Tennessee, sitting by designation.

in *Jones Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), we affirm.

I.

On July 17, 2001, the prison punished Walton for assaulting a prison officer by giving him a sanction referred to as an "upper slot restriction" for an indefinite period of time. Nearly a year later, in early April 2002, Walton, an African American, filed a prison grievance charging Assistant Deputy Warden (ADW) Ron Bobo with racial discrimination for giving him the indefinite upper slot restriction. Walton claims that while white prisoners were given definite upper slot restrictions (30 or 60 days at most) for similar assaults, he was given an indefinite restriction. In support of his claim, he identified a white prisoner who had received a definite upper slot restriction for a similar infraction. In Step I of the prison's grievance process, he charged only Bobo with responsibility for the incident. The prison responded to his grievance by stating that ADW Ken Gearin had placed Walton on an indefinite upper slot restriction and that racial discrimination had nothing to do with Gearin's decision. Such restrictions, the prison explained, are imposed individually and one prisoner's restriction does not affect the discipline that another prisoner receives.

Walton appealed his claim to Step II of the grievance process, restating his allegations from Step I and claiming racial discrimination on the part of "corrupt administration[] heads, warden, et[] al[.]" Prisoner Grievance Appeal Form at Step II (contained in Walton Reply Br. at 14). The prison responded that Walton had failed to present any

new evidence at Step II and that its Step I response adequately addressed Walton's allegations.

Walton appealed to Step III of the grievance process, the final level of appeal. In addition to restating his earlier allegations, he identified an additional white prisoner who was given a definite upper slot restriction for misconduct that allegedly paralleled Walton's misconduct. The prison denied the Step III appeal, stating that the responses in Steps I and II adequately addressed Walton's concerns.

Having obtained no relief in the grievance process, Walton filed this action under § 1983 and the Fourteenth Amendment against Warden Barbara Bouchard, ADW Gearin, ADW Bergh, prison employee Cathy Bauman, case manager Denise Gerth and ADW Bobo. In his request for relief, he asked the court to order the defendants to remove the upper slot restriction and to order each of the defendants to pay him up to $750,000 in compensatory and punitive damages.

At the time Walton filed this complaint, several district courts within this circuit had reached different conclusions about whether the Prison Litigation Reform Act (PLRA), *see* 42 U.S.C. § 1997e(a), required the dismissal of a prisoner's complaint if it contained both exhausted and unexhausted claims. The district court in this case sided with the total-exhaustion school of thought and dismissed Walton's complaint without prejudice for his failure to exhaust administrative remedies against each named defendant. Guided by our recent decision in *Jones Bey*, we now follow the same path and affirm.

II.

We give fresh review to a district court's dismissal of an action for failure to exhaust administrative remedies. *Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001). Exhaustion of administrative remedies is mandatory, we have said, "even if proceeding through the administrative system would be futile," *Jones Bey*, 407 F.3d at 805 (quotations and citation omitted), and even if the defendant does not raise the defense, *see Burton v. Jones*, 321 F.3d 569, 574-75 (6th Cir. 2003) (noting that a district court should "enforce the exhaustion requirement *sua sponte*, if not raised by the defendants"). The inmate bears the burden of establishing that he has exhausted his administrative remedies. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998).

Under the PLRA, "[n]o *action* shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). In view of the exhaustion provision's reference to "action" and the PLRA's other reference to "claim," 42 U.S.C. § 1997e(c)(2), another panel of this court recently interpreted § 1997e(a) to "require[ ] a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims." *Jones Bey*, 407 F.3d at 805.

We also have previously held that a prisoner must "file a grievance against the person he ultimately seeks to sue." *Curry*, 249 F.3d at 505. Such a requirement is consistent with the aims of the PLRA as it gives the prison administrative system "a chance to deal with claims

against prison personnel before those complaints reach federal court." *Id.* And not only must the prisoner file a grievance with regard to each defendant, he "must administratively exhaust his . . . claim as to each defendant associated with the claim." *Burton*, 321 F.3d at 574. In order to exhaust "a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the [Michigan Department of Corrections] grievance process." *Id.* at 575. *See id.* at 574 ("By negative implication, we understand these [Michigan] policies to preclude administrative exhaustion of a claim against a prison official if the first allegation of mistreatment or misconduct on the part of that official is made at Step II or Step III of the grievance process.").

Walton has not satisfied these requirements. He named only ADW Bobo in Step I of his grievance process, and under our precedent that is the only claim that we may consider exhausted. *See id.*; *see also Curry*, 249 F.3d at 505. His claims as to all other defendants remain unexhausted and accordingly the district court properly dismissed the entire complaint under *Jones Bey's* total-exhaustion requirement.

In his pro se brief on appeal, Walton argues that by mentioning "corrupt administration[ ] heads, warden, et[ ] al[.]" during the grievance process, he gave any unnamed party notice of the allegations because the prison at that point could have determined which prison employees were involved in the incident. But Walton's reference to "corrupt administration[ ] heads, warden, et[ ] al[.]" came at Step II of the process, not Step I – the step at which a prisoner generally must name each defendant. *Burton*, 321 F.3d at 575. And in response to his Step I grievance, the prison

gave Walton all of the information that he needed to comply with this requirement. Far from leaving Walton in the dark as to which prison officials were responsible for his alleged mistreatment, the prison told him that ADW Gearin gave him the upper slot restriction. At that point, Walton was armed with all of the information that he needed to file a Step I grievance against ADW Gearin – and a federal complaint against Gearin once the claim had been exhausted – but he simply chose not to follow this route. Even if we took the view, moreover, that the prison's acknowledgment that ADW Gearin was responsible for Walton's upper slot restriction establishes that Walton adequately exhausted his claim against Gearin, it would not establish that Walton exhausted his claims against the other defendants by identifying them by name or position in Step I of the grievance process.

III.

For these reasons, we affirm the district court's dismissal of Walton's complaint without prejudice.